

No. 741.

Office Supreme Court, U. S.
FILED
APR 11 1917
JAMES D. MAHER
CLERK

In the
Supreme Court of the United States.
October Term, 1916.

THE UNITED STATES

VERSUS

BESSIE WILDCAT, a Minor, et al.

INVOLVING THE BARNEY THLOCCO ALLOTMENT.

BRIEF ON BEHALF OF APPELLEES.

C. B. Stuart,
A. C. Cruce,
Geo. S. Ramsey,
Malcolm E. Rosser,
Edgar A. deMeules,
Villard Martin,
John Devereux,
J. E. Wyand.
K. B. Turner,
M. E. Turner,
J. B. Furry,
E. C. Motter,

P. J. Carey,
W. C. Franklin,
John J. Shea,
Burdette Blue,
Thomas F. Shea,
William A. Collier,
Hazen Green,
E. J. Van Court,
Chas. A. Moon,
Francis Stewart,
Joseph C. Stone,
Attorneys for Appellees.



In the
SUPREME COURT OF THE UNITED STATES.
October Term, 1916.

No. 741.

THE UNITED STATES

vs

BESSIE WILDCAT, a Minor, et al.

INDEX.

	(page
Statement	1
The certificate should be disregarded for errors of fact	6
The evidence	15
Erroneous statements of fact in the government's brief	25
Erroneous statements of fact in the brief upon behalf of Bissett and others	30

PROPOSITION ONE.

THE COMMISSION TO THE FIVE CIVILIZED TRIBES WAS A SPECIAL TRIBUNAL VESTED WITH JURISDICTION AND POWER TO HEAR AND DETERMINE THE CLAIMS OF ALL PERSONS IN THE FIVE CIVILIZED TRIBES FOR CITIZENSHIP, AND ITS ENROLLMENT OF BARNEY THLOCCO AS A CITIZEN OF THE CREEK NATION CONSTITUTES ITS JUDGMENT IN THAT MATTER, AND THIS JUDGMENT IS CONCLUSIVE OF THE FACT THAT BARNEY THLOCCO WAS ALIVE ON APRIL 1, 1899, AND ENTITLED TO ENROLLMENT, SINCE THE CONSIDERATION AND DECISION OF THAT QUESTION WAS INDISPENSABLE TO THE DETERMINATION OF BARNEY THLOCCO'S RIGHT TO CITIZENSHIP 31

A. The tribal rolls made by the Dawes Commission approved by the Secretary of the Interior were made final by Acts of Congress and are not subject to impeachment. But if

INDEX—CONTINUED.

	(page
subject to attack they may be impeached only for mistake of law or a gross mistake of the facts proved or for fraud, as in public land cases. First undertaking to show that after March 4, 1907, the rolls were not subject to impeachment upon any ground, we shall then assume, for the purposes of further argument, that they may be impeached as in public land cases	36
 B. The jurisdictional point involved is this: Did the Commission have power to deal with the question, Was Barney Thlocco alive April 1, 1899, to hear the particular facts relating to this question, and to determine whether or not the facts were sufficient to invoke the exercise of that power? The test of its jurisdiction is whether the Commission had power to enter upon the inquiry, not whether its conclusion in the course of it is right or wrong. It was by the exercise of precisely the same jurisdiction or power that the Commission struck some names from the Creek tribal rolls because they died before April 1, 1899, and enrolled others because they were found to be alive on that date	63
Shall the Court Become a Dawes Commission?	64
 The authorities cited by the government on the question of jurisdiction examined. A finding by the Commission that a dead man was alive is not analogous to an adjudication in an administration matter that a living man is dead	93
Iowa Land and Trust Company v. United States, Known as the Hawkins Case	95
 C. The authority and jurisdiction of the Commission to the Five Civilized Tribes as defined by the authorities	100
 D. The complainant pleaded and attempted to prove only a mistake of law. No mistake of fact was alleged or proved; nor is there any issue of fraud involved	110
 E. If the finding of the Commission was based upon any evidence, the action of the Commission enrolling Thlocco is conclusive. The courts cannot inquire into the extent of investigation made by the Commission. The enrollment of Thlocco is a determination or judgment not only that he had the right to be enrolled, but that he was enrolled	

INDEX—CONTINUED.

	(page
in the manner required by law. The trial court held properly that the government must prove first of all that there was no evidence before the Commission before a retrial of the issue passed upon by the Commission. The trial court's opinion on the evidence set forth	116
Manner of Enrollment Adjudicated as Well as Right to Enrollment	140
The Court Will Not Consider the Extent of Investigation by Commission. As to Order of Proof	141
F. In absence of the evidence adduced before the Commission the courts will presume that there was legal, competent and relevant evidence to support each finding of the Commission	142
G. The burden is upon the complainant, however difficult the undertaking, to prove a negative, namely: that there was no evidence before the Commission upon the question, Was Barney Thlocco alive April 1, 1899. It must be admitted that the evidence upon behalf of the government does not even tend to show that Thlocco was enrolled without evidence	143
H. The judgment of the Commission may be rebutted only by full, clear, convincing and unambiguous proof that there was no evidence before the Commission to sustain its finding	145
I. The jurisdiction of the Commission was analogous to the jurisdiction of the land department of the government in land cases, but the Commission's findings more nearly approached the dignity, sancity and conclusiveness of a court decree	146
J. The Commission was authorized "to detail clerks to aid in the performance of their duties" and "to use every fair and reasonable means within their reach" for the purpose of making the final rolls. If the Commission had enrolled Thlocco upon evidence heard by a clerk the enrollment nevertheless would have been quasi-judicial and not merely administrative. But the Commission as a body "thoroughly examined the evidence" and from the evidence enrolled Thlocco	148

INDEX—CONTINUED.

	(page
K. The Creek Nation was represented by an attorney and by head men of the tribe at the time of Thlocco's enrollment. If the hearing was ex parte it was such only as to the heirs and not as to the government or the Creek Nation	158
Creek Attorney, Creek Commission and Town Kings All Present at Thlocco's Enrollment	160
L. To sustain the government would be to destroy rules of property established by the uniform decisions of the Circuit Court of Appeals for the Eighth Circuit extending over a period of seventeen years, to destroy utterly many land titles in the hands of innocent purchasers, and to cloud hopelessly many thousands of titles without so much as a forum, except at the will of the government as complainant, to test their validity	162
M. The government asks for the establishment of a new rule which would permit the United States in a court of equity to re-try a question of fact already passed upon by a land department of the government without first impeaching the finding of the department upon one of the recognized grounds of attack, namely, for error of law, gross mistake of fact, or for fraud	166
N. The hearing in the case of Thlocco was exactly the same as in all other uncontested cases. Thlocco was "accounted for" at a hearing at Okmulgee, the capital of the Creek Nation, though subsequent investigation was made to verify the conclusion reached at the Okmulgee hearing. The presumption of continued life considered. The high points of the government's testimony showing that Thlocco was enrolled regularly, restated	167
Presumption of Life	168

PROPOSITION TWO.

THE ATTEMPTED CANCELLATION OF THLOCCO'S ENROLLMENT WAS WHOLLY VOID. THE SECRETARY'S ORDER DOES NOT PURPORT TO AFFECT THE TITLE OR THE PATENTS, HE HAVING HELD EXPRESSLY THAT THE PATENTS HAD ISSUED AND HAD BEEN DELIVERED	169
--	-----

INDEX—CONTINUED.

(page

PROPOSITION THREE.

THE CERTIFICATE OF ALLOTMENT AND DEEDS TO
THLOCCO WERE NOT NULL AND VOID BECAUSE HE
WAS DEAD AT THE TIME THEY WERE MADE187

A. The fact that Thlocco died prior to June 30, 1902, the date
when the allotment was made in his name, is immaterial 191

(1) The provision at section 28, Original Creek Agree-
ment, "If any citizen has died * * * before re-
ceiving his allotment of lands and distributive
share of all the funds of the tribe, the lands and
money to which he would be entitled if living,
shall descend to his heirs according to the laws
of descent and distribution of the Creek Nation,
and be allotted and distributed to them accord-
ingly," is of substance, not mere form, the heirs
taking the lands as if by descent and as of the
date of Thlocco's death and as if he had been vest-
ed with full title191

(2) The land did not pass by grant; it was received
in partition or allotment, and therefore the rules
governing an ordinary grant do not apply211

(3) The Commission was required by mandatory Acts
of Congress to make arbitrary allotments in cases
where the enrolled members did not select for
themselves within a reasonable time (the privil-
edge of selection not being accorded to the heirs).
Acceptance of allotment certificates and patents
was not necessary to pass title. According to
departmental practice and construction of the
statutes involved, not only did the Commission
have the right to make arbitrary allotments but
the certificate of allotment and patent in the name
of the dead allottee are valid216

In re Heirs of Jemima242

(4) This case is not analogous to an action invol-
ving patent issued to a fictitious person. The au-
thorities cited upon behalf of the government in-
volving patents to fictitious persons examined and
found to be not in point251

United States v. Hawkins253

INDEX—CONTINUED.

(page

- B. The allotment certificate was final and conclusive evidence of the complete equitable title conferred upon the heirs of Thlocco by the Original Creek Agreement. The certificate, like a patent, dual in its effect, was an adjudication of the special tribunal empowered to decide the question that Thlocco was entitled to the land and was a conveyance of the right to full legal title258

- C. Title by patent from the United States to the Creek Nation is title by record; and delivery of the instrument to the grantee is not essential to pass the title; therefore, when the patent was recorded upon the public records on the 11th day of April, 1903, the legal title of the land passed267

- D. The Act of May 20, 1836, 5 Stat. 31, providing "that in all cases where patents for public lands have been or may hereafter be issued in pursuance of any law of the United States, to a person who had died or who shall hereafter die, before the date of such patent, the title to the land designated therein shall inure to, and become vested in, the heirs, devisees or assigns of such deceased patentee as if the patent had issued to the deceased person during his life," is applicable to the patents here involved271

- E. Assuming that legal title had not theretofore passed, it did pass by section 5, Act of April 26, 1906, 34 Stat. 137. This land was not "involved in contest" on April 26, 1906. 277
 - No Contest Was Pending279

- ~~Appendix No. 6~~—Rules of practice governing land contests approved by the Secretary of the Interior July 18, 1899281 ~~161~~

- F. Assuming that the legal title had not theretofore passed, it did vest in the heirs by section 32 of the Act of June 25, 1910, 36 Stat. 863293

- G. If patent to Thlocco did not pass title to his heirs as a matter of law the right thereto is equivalent to the patent and equity will do that which ought to have been done, and will decree title to the heirs294

INDEX—CONTINUED.

(page

PROPOSITION FOUR.

THE UNITED STATES HAS NO PECUNIARY INTEREST IN THIS LITIGATION, THE ACTION BEING FOR THE BENEFIT OF THE CREEK NATION, AGAINST WHICH THE DOCTRINE OF LACHES APPLIES, THE GOVERNMENT IS ESTOPPED TO PROSECUTE THE ACTION295

The Opinion of First Assistant Secretary Jones "In Re Heirs of Jemima"Appendix

ACTS OF CONGRESS.

Act of May 20, 1836 (5 Stat. 31)190, 271

Act of June 10, 1896 (31 Stat. 321)38, 153

Act of June 28, 1898 (30 Stat. 495):

Section 2143, 48, 49, 51

Section 20153

Act of June 2, 1900 (31 Stat. 250):

Section 2198

Act of March 1, 1901 (31 Stat. 861):

Section 28194, 51, 54, 188, 191, 227

Section 6205, 289

Section 3211

Section 23262

Act of March 3, 1901 (31 Stat. 1058, 1077)53, 54

Act of July 1, 1902 (32 Stat. 641):

Section 22229, 192, 198

Section 23261, 259

Act of July 1, 1902 (32 Stat. 716):

Section 20192, 197

Section 21261, 259

Section 69289

Act of April 26, 1906 (34 Stat. 137):

Section 5277

Act of June 25, 1910 (36 Stat. 863):

Section 32293

COMMISSION REPORTS.

(pages

Reports of Commission to the Five Civilized Tribes for Fiscal
years ended as follows:

June 30, 1901	291
June 30, 1902	222
June 30, 1903	224, 291
June 30, 1904	225, 291
June 30, 1905	226, 291, 292
June 30, 1909	291
June 30, 1910	291

CASES CITED.

Appeal of Bixler, 59 Cal. 550	55
Blanding v. Sayles, 49 Atl. 992, 23 R. L. 226	55
Brown v. Carter, 42 Okla. 565, 144 Pac. 170	265, 258
Colo. Coal Co. v. U. S., 123 U. S. 307, 31 L. ed. 182, 143, 117, 124, 142	
Cornelius v. Kessel, 128 U. S. 456, 32 L. ed. 482	185
Crews v. Burcham, 66 U. S. 352, 17 L. ed. 91	273, 192
deGraffieried v. Iowa Land & Trust Co., 20 Okla. 687	258
DeCambra v. Rogers, 189 U. S. 119, 47 L. ed. 734	
.....	119, 116, 140, 156
Doe v. Exer's Gugan, 8 Ohio Rep. 87, 108	267
Doe v. Wilson, 64 U. S. 457, 16 L. ed. 584	192, 272
Durango Land Co. v. Evans, 25 C. C. A. 523, 80 Fed. 425	
.....	124, 117, 123, 143
Fleming v. McCurtain, 215 U. S. 56, 54 L. ed. 88	239
Folk v. United States, 233 Fed. 177, 192	
109-110, 126, 135, 296-300, 50, 64, 100, 117, 143, 155, 161, 169, 192	
French v. Fyan, 93 U. S. 169, 23 L. ed. 812	79, 64
Galloway v. Finley, 12 Peters 264, 9 L. ed. 1079	276
Garfield v. United States ex rel Goldsby, 211 U. S. 249, 53 L.	
ed. 168	176-182, 175, 259
Garfield v. United States, 30 App. D. C. 175	258
Gaylord v. Carroll. (Ore.) 142 Pac. 357	294
Goat v. United States, 222 U. S. 458, 56 L. ed. 841	260
Godfrey v. Iowa Land & Trust Co., 21 Okla. 293, 310, 95 Pac.	
792	275, 294
Goings v. Chapman, 18 Ind. 194	141, 117
Gould v. West, 32 Tex. Rep. 339, 350	192, 211
Gritts v. Fisher, 224 U. S. 640, 56 L. ed. 928	222, 237
Guaranty Savings Bank v. Bladow, 176 U. S. 448, 44 L. ed.	
540	259

CASES CITED—CONTINUED.

	(pages
Harnage v. Martin, 40 Okla. 341, 136 Pac. 154	114, 110, 116
Hartwell v. Havighorst, 11 Okla. 189, 66 Pac. 337	116, 118
Hartwell v. Havighorst, 196 U. S. 635, 49 L. ed. 629	116
Howe v. Parker, (C. C. A.) 190 Fed. 738	112-114, 110, 116, 119
Iowa Land & Trust Co. v. United States, (Hawkins case) 217 Fed. 11	95, 253
James v. Germania Iron Co., 46 C. C. A. 476, 107 Fed. 597	121, 110, 117, 142, 143
Johnson v. Drew, 171 U. S. 93, 43 L. ed. 88	105, 100
Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49	192, 259
Kimberlin v. Commission to the Five Civilized Tribes, 44 C. C. A. 109, 104 U. S. 653	101-103, 100, 117, 155
LeRoy v. Jamison, Fed. Cas. No. 8271	241
Lewis v. Shaw, 59 Fed. 517	259
Lone Wolf v. Hitchcock, 187 U. S. 553	222
Lytle v. State of Arkansas, 9 How. 315, 13 L. ed. 153	155
Malone v. Alderdice, 129 C. C. A. 204, 212 Fed. 668	100, 107, 155
McArthur's Heirs v. Dun's Heirs, 7 How. 263, 12 L. ed. 693, 696	210
McCarthy v. March, 5 N. Y. 263	100
McDougal v. McKay, 237 U. S. 372, 59 L. ed. 1001	191, 211, 213
M'Goldrick Lbr. Co. v. Kinsolving, 137 C. C. A. 377, 221 Fed. 819	120, 116
McKee v. Henry, 201 Fed. 74	222
Mullen v. United States, 224 U. S. 448, 56 L. ed. 834	198-202, 231, 264, 191, 207, 259, 278
Neff v. United States, 91 C. C. A. 241, 165 Fed. 273	100, 105
New Dunderberg Min. Co. v. Old, 25 C. C. A. 116, 79 Fed. 598	81, 64
Noble v. Union River Log. Co., 147 U. S. 164, 37 L. ed. 123	82-90, 185, 64, 154, 156
Nordyke v. Shearon, 12 Ind. 346	117
Nunn v. Hazelrigg, 132 C. C. A. 474, 216 Fed. 330. 105, 100, 140, 155	105, 100, 140, 155
Oliver v. Forbes, 17 Kan. 113	275
Opinion Trial Court (this case)	135-140
Orchard v. Alexander, 157 U. S. 372, 39 L. ed. 737	157, 141, 154
Paine v. Foster, 9 Okla. 213, 53 Pac. 109	117, 116
Peyton v. Desmond, 129 Fed. 1, 9	184, 267, 270
Rindeau v. Beaumette, 4 Minn. 224	55
Sanford v. Sanford, 139 U. S. 642, 35 L. ed. 290	116, 119
Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896	94
Sharon v. Hill, 26 Fed. 337, 389	54

CASES CITED—CONTINUED.

	(pages
Shulthis v. McDougal, 170 Fed. 529	196, 213, 50, 191, 211, 278
Slzemore v. Brady, 245 U. S. 441	222
Skelton v. Dill, 235 U. S. 206, 59 L. ed. 198	204, 191, 211, 278
Spratt v. Spratt, 4 Peters 407	99
Stark v. Starr, 6 Wall. 402, 18 L. ed. 925	294
State v. Hoeflinger, 35 Wis. 400	99
St. Louis Smelting Co. v. Kemp, 14 Otto. 636, 104 U. S. 636, 26 L. ed. 875	90-93, 155, 270, 64, 154, 267
Thompson v. Hill, (Okla.) 150 Pac. 203	258
Uinta Tunnel Co. v. Creede, 57 C. C. A. 200, 119 Fed. 164	100
U. S. v. Atherton, 102 U. S. 372, 26 L. ed. 213	117
U. S. v. Iron Silver Min. Co., 128 U. S. 673, 32 L. ed. 572 . . .	117, 142
U. S. v. Maxwell Land Grant Co., 121 U. S. 325, 30 L. ed. 949	117, 143
United States v. Hitchcock, 190 U. S. 316, 47 L. ed. 1074	157, 154, 158
United States v. Northern Pac. R. Co., 37 C. C. A. 290, 95 Fed. 864	79-81, 64, 117
United States v. Shurz, 12 Otto. 378, 102 U. S. 273, 26 L. ed. 167, 173	90, 267-269, 64, 241
United States v. Winona & St. P. R. Co., 15 C. C. A. 96, 67 Fed. 948	67, 69-78, 64
Wallace v. Adams, 74 C. C. A. 540, 143 Fed. 716, 723	37, 147, 263, 100, 146, 191, 258
Wallace v. Adams, 204 U. S. 415, 51 L. ed. 547	100
Wood v. Chapin, (N. Y.) 67 Am. Dec. 62	259
Woodward v. deGraffenried, 238 U. S. 284, 59 L. ed. 1311, 1328	290, 191, 205, 206, 241, 258, 264

In the
SUPREME COURT OF THE UNITED STATES.
October Term, 1916.

No. 741.

THE UNITED STATES
vs
BESSIE WILDCAT, a Minor, et al.

BRIEF of APPELLEES.

Statement.

This is an action by the United States to set aside a patent issued in the name of Barney Thlocco, a citizen of the Creek Nation, for the benefit of his heirs. The government pleads a mistake of law, namely, that the Commission enrolled Thlocco without any evidence upon the question: Was he alive April 1, 1899, and further charges that he was in fact then dead and therefore not entitled to enroll-

ment. The defendants resisting the government deny that the enrollment was made without evidence and allege that Thlocco was enrolled upon evidence supporting the Commission's findings, and further allege that he was alive April 1, 1899. The preliminary question presented by the government's bill is: Was there any evidence to support the Commission's judgment. The trial court held that the government had no right to retry the question, Was Barney Thlocco alive April 1, 1899, without first proving that the Commission enrolled him without evidence. The government undertook to show that there was no evidence before the Commission upon the question, Was Thlocco alive April 1, 1899; but the witnesses for the complainant testified positively that there was convincing evidence upon the question before the Commission and that the Commission enrolled Thlocco upon satisfactory proof. The bill was framed on the theory that the United States must first impeach the judgment of the Commission, but after the evidence was in the government abandoned that theory. The contention now made upon behalf of the United States comes to one point: It is claimed that the government may retry the question, Was Barney Thlocco alive April 1, 1899, without impeaching the judgment of the Commission, without showing that the enrollment was made by mistake of law, no gross mistake of the facts proved or fraud being alleged.

Barney Thlocco was enrolled by the Commission to the Five Civilized Tribes May 24, 1901, and the allotment was made and the certificate therefor issued June 30, 1902. Patents were recorded in the office of the Commission to the Five Civilized Tribes, a public record, April 11, 1903, the allotment certificate and patents issued in the name of Thlocco. The defendants Bissett, Toxaway Oil Company, Moore and Cosden, claim five acres of the 160 acres involved through an attempted filing made by Jonathan R. Posey on May 19, 1913. On August 25th, 1904, the Commission transmitted to the Secretary of the Interior a communication from the Creek attorney in the nature of a motion to reopen the matter of the enrollment of Thlocco. September 16, 1904, the Secretary of the Interior ordered further investigation in the matter of Thlocco's right to enrollment, and directed that notice be given to his heirs of a hearing. An attempt was made to locate the heirs of Thlocco, but they were not found, and no notice was ever given of the proposed hearing. Some affidavits were taken tending to show that Barney Thlocco died before April 1, 1899, and upon that showing and without any notice to the heirs, on the 13th day of December, 1906, the Secretary of the Interior ordered that the name of Barney Thlocco be stricken from the rolls, finding in his order that the patents to both the surplus and homestead allotments had been is-

sued and delivered and referring the case to the Attorney General for such action as might seem to him proper. The government having failed to prove that the Commission enrolled Thlocco arbitrarily and without evidence, no evidence was offered upon the part of the defendants and decree was entered against the government. The Circuit Court of Appeals for the Eighth Circuit certified to this court three questions, as follows:

1. Should the evidence offered by the government to show that Thlocco died prior to April 1, 1899, have been admitted?
2. Should the evidence offered by the government to show that Thlocco's enrollment was cancelled by the Dawes Commission have been admitted?
3. Were the certificate of allotment and deeds to Thlocco null and void because he was dead at the time they were made?

Counsel for the government concede that question No. 3 is without merit, and therefore do not insist that the certificate of allotment and deeds to Thlocco were void because issued in his name after his death, but Bissett and others, claiming through Posey, insist that question No. 3 be answered in the affirmative. As to question No. 2 the government

only contends that the evidence showing the attempted cancellation of Thlocco's enrollment should have been admitted to show the history of the case, methods of the Commission and diligence upon the part of the government acting upon behalf of the Creek Nation; but counsel for Bissett and others insist that said attempted cancellation of Thlocco's enrollment shifted the burden of proof so as to require Thlocco's heirs to show in this case his right to enrollment. Defendants resisting the government contend that the entire proceeding to cancel was without process of law and wholly void. They say that the three questions should be answered in the negative and contend that if the judgment of the Commission enrolling Thlocco may be impeached upon any ground that an action will lie only for error of law, gross mistake of the facts proved, or for fraud, as in public land cases. No question of fraud is involved. No mistake of the facts is pleaded or attempted to be proved.

For convenience we shall herein refer to the defendants resisting the government as defendants, without reference to those who join the government in seeking to cancel the enrollment and allotment. The whole record and case have been brought to this court upon application of the defendants.

THE CERTIFICATE.

The certificate should be disregarded for errors of fact.

We challenge most respectfully the certificate as erroneous in fact, and for the further reason that the findings of fact are so mixed with questions of law that the statements therein cannot assist the court, such as that :

(a) The certificate recites (Rec., p. 199) : "No person appeared to request Thlocco's enrollment." But the enrolling clerk testified upon behalf of the government that he completed Barney Thlocco's roll or census card at the Okmulgee hearing May 24, 1901, and "that in all cases where the card was completed in every respect over there some one *must have appeared*, because those old census cards were made prior to April 1, 1899, and we didn't know whether they were living or dead." (Rec., p. 69.) On this same point Mr. Hastain testified for the government that on that occasion at Okmulgee the Town Kings and other citizens of the Creek Nation appeared before the enrolling party *constantly giving information as to the rights of citizens to be enrolled and as to whether or not they were living April 1, 1899.* (Rec., p. 87.)

(b) At page 198 of the record the certificate recites, referring to Thlocco: "His card was made out at Okmulgee on the 24th day of May, 1901 * * * to meet the requirements of sec. 28." It was supposed by the enrolling party that all citizens whose names were not enrolled before the adoption of the treaty might lose their right to enrollment. The evidence shows, as Mr. Hastain testified: "In the course of our work at Okmulgee when we had information that the name was entitled to go on the final rolls we completed the card, and if we didn't have the information or evidence we didn't complete it." (Rec., p. 85.) Merrick, the enrolling clerk, said: "I never listed any man for enrollment without some information or evidence. It was our purpose to have information from some direction before we would complete the card and if we found any Indian whom we couldn't get any information about with reference to April 1, 1899, we left that card incomplete." Continuing to the same point he testified that it was the invariable custom and practice never to complete a card until they had reliable information showing that the citizen was alive April 1, 1899, and that no man was ever enrolled or received a completed card solely because he was on the old rolls, and that they required evidence outside of the rolls before completing a card. (Rec., pp. 69-71.) Therefore Barney Thlocco was not listed for

want of information but because the Commission had before them the evidence.

(c) At page 198 the certificate recites, with reference to the old census card: "It contained the descriptive matter needed to complete Thlocco's new census card. Thlocco's new census card was therefore made out on the 24th day of May, 1901, complete as it appears in the final rolls approved by the Secretary of the Interior." It appears to us that this recital is in direct conflict with the evidence, which shows that no card was ever made complete merely by taking the information from an old card, but on the other hand proof was first heard on the question, Was the citizen alive April 1, 1899, and the completion of the card was evidence that this question had been investigated.

(d) At page 199 the recital appears: "There is no evidence in the record as to what, *if any*, investigation was made at the time Thlocco's card was made or subsequently to ascertain whether he was living on the first day of April, 1899." We respectfully insist that this finding is misleading in the use of the words "if any," which might imply that the record is silent on the question as to whether or not evidence was heard with respect to the question, Was Barney Thlocco alive April 1, 1899. Instead of this recital the court should have found expressly that

evidence was heard by the Commission to determine the question, Was Barney Thlocco alive April 1, 1899, and that from that evidence the Commission was satisfied of his right to enrollment. Merrick, the enrolling clerk, testified with reference to the enrollment of Barney Thlocco: "I was satisfied that he was living on April 1, 1899 * * * before I prepared the schedule and submitted it to Mr. Bixby. * * * We would ask Town Kings and Town Warriors when they came in and anybody else if they knew this or that." (Rec., p. 68.) And again: "I don't think I ever arbitrarily enrolled a person." (Rec., p. 70.) Mr. Hopkins, a member of the enrolling party, testified in response to the question, "Did they enroll any citizen without evidence?" "No, sir, I don't believe; in fact, I don't see how it would be possible to do it." (Rec., p. 82.) Mr. Hastain said upon the evidence showing that the roll card was completed at Okmulgee: "If that card was completed at Okmulgee it indicates that the party who wrote the card was satisfied on that date that Thlocco was living on April 1, 1899, satisfied on some form of evidence, must have been." (Rec., p. 86.) And further to the same point: "We were getting all the information we could from every source possible at that time," and in answer to the question, "They came before you almost constantly, didn't they?" he replied, "Yes, sir." In answer to the question, "And one of the particular points that

you were constantly investigating was whether or not these persons were living on April 1, 1899?" he answered in the affirmative. Mr. Bixby, the Chairman of the Commission, testified that in every case some member of the Commission, and upon evidence outside of the rolls, reached the conclusion that every enrolled Creek citizen was alive April 1, 1899, saying: "I know; I was on the job all the time and was satisfied that every name on the roll was entitled to be on the rolls."

(e) At page 199 the certificate recites: "The evidence is conclusive that the Commission throughout its dealing with his name from the time of his enrollment down to the time of issuing and recording his deeds believed him to be alive." The government does not accept this finding, but now contends that the Commission knew all this time that Thlocco was dead, and complains because the Commission treated him as alive, knowing that he was dead. Merrick, the enrolling clerk, testified: "We knew that Thlocco was dead, and we were apparently satisfied at Okmulgee that he was living April 1, 1899, but that did not preclude further investigation." The enrolling party had information as to the death of Thlocco, because Hopkins had discovered the fact of his death from some investigation on his own account and had endorsed on Thlocco's 1895 roll card the words "Died

in 1900." On this point Mr. Hopkins said that this notation meant that he had personally some information before him as to whether or not Barney Thlocco was living April 1, 1899, else he would not have made that notation. (Rec., p. 82.) He explains the fact that the certificate of allotment and patent were issued in the name of Thlocco as follows: "With reference to the patents the practice was to issue the patent in the name of the party according to the roll where no proof of death was filed by the Commission or where the heirs had not appeared and filed proof of death and claimed the right to have the deed issued to them."

(f) The certificate at page 196, and elsewhere, expresses the view that the enrollment of Thlocco was "purely administrative," but the Commission acted judicially and so understood their work. See pages 6 and 7, Annual Report of the Commission to the Five Civilized Tribes to the Secretary of the Interior, filed October 3, 1898, where the Commission said, referring to the work of enrollment and Acts of Congress relating thereto: "This compels the Commission to pass judicial judgment upon the right to citizenship of every name upon the citizenship roll of each of the Five Tribes. No clerk or other substitute can do this work. It must be done personally by the Commission and upon a hearing of evidence

in each case where there is any question." The letter of transmission in the case of Barney Thlocco and others to the Secretary of the Interior for the approval of the work of the Commission recites that the Commission had examined the evidence as to Barney Thlocco's right to enrollment. The enrollment therefore was the *quasi*-judicial act of the Commission. We show under Proposition I, paragraph J, that the conclusion of the Honorable Judges that this work was administrative merely and not *quasi*-judicial is in open conflict with the decisions of this court. The finding that the enrollment of Thlocco was administrative merely is an erroneous conclusion of law instead of a finding of fact.

(g) At page 194 the certificate says that the deeds were never delivered. But the Secretary of the Interior found that they had been issued and had been delivered prior to December 13, 1906. (Rec., p. 61.)

(h) At page 194 the certificate finds that a rehearing was granted and was had in the matter of the enrollment of Barney Thlocco. But there was no rehearing, because there could be none without notice to the heirs. The record affirmatively shows that no notice was given to the heirs (Rec., p. 60) which important fact is omitted from the certificate.

(i) In the certificate, page 197, it is said:

“ Section 4 of the Original Creek Agreement by express provision permitted selections of allotments for minors to be made by the head of the family or by their guardian. Thus by implication it forbade the selection of allotments for adults to be made otherwise than by the citizen in person.”

The court evidently overlooked the following language which occurs in the same section:

“ And if for any reason such selection be not made for any citizen, it shall be the duty of said Commission to make selection for him.”

Under Proposition III, sub-head A (3), we show that arbitrary allotments were required by law in such cases.

(j) At page 199 the certificate recites, with reference to the census card of Thlocco: “That card being complete, his name would in the regular practice of the Commission be transferred to the final rolls unless some reason was brought to the notice of the Commission or its clerical force showing that the name ought not to be transferred to the final roll.” But this card was the final roll as far as Thlocco was concerned. This card in itself constituted a part of the final rolls without transfer, but the really important error in this statement is the implication that in regular course the card would become final without

any further investigation unless Thlocco's right to enrollment was challenged, whereas the evidence shows, as was testified to by Merrick: "I would have to say that after Thlocco's name was listed on the card at Okmulgee on May 24, 1901, there was some further investigation upon the question as to whether or not he was living or dead on April 1, 1899." (Rec., p. 68.) And again: "There evidently was some further investigation." (Rec., p. 69.) On this point Mr. Hopkins testified: "The Commission following that meeting at Okmulgee commenced in August thereafter and continually carried on investigation for evidence as regards each name." (Rec., p. 81.) Mr. Bixby, the chairman of the Commission, said: "I have no doubt but what we would subsequently conduct an investigation as to those whose census cards were incomplete or as to particular ones whom we then listed as unaccounted for not only as to them only, but we investigated all the time everybody that there was any doubt about." The evidence shows that in the case of incomplete cards the Commission made an original investigation after the Okmulgee hearing; that in the case of completed cards, like that of Thlocco, they continued their investigation and verified their belief that those whose names were on the completed cards were entitled to enrollment. Thlocco was accounted for at Okmulgee, and subsequent investigation followed, as in all similar cases.

The history of this case is so difficult, we beg to express the view that the errors of fact here complained of are most pardonable.

The EVIDENCE.

The testimony showing how Thlocco was enrolled appears by the following witnesses:

Edward Merrick, the enrolling clerk. .66, 73, 89	
Philip B. Hopkins.	76
E. Hastain.	85
John G. Lieber.	89
Tams Bixby.	94

EDWARD MERRICK testified, in part, as follows: That as enrolling clerk for the Commission he was in attendance with the enrolling party at Okmulgee in May, 1901. That he and Mr. Hastain did the most of the work of listing Creek citizens on the census cards for enrollment. That the enrolling party went to Okmulgee to investigate those whose names were on the 1890 and 1895 tribal rolls not theretofore accounted for. That the United States Marshal and his force went with the enrolling party to help bring in the Indians and procure the evidence as to the right of the unaccounted for members to enrollment. That a great many Indians were brought in, many

wagons and teams being used all over the country. That he listed the name of Barney Thlocco for enrollment on the 24th of May, 1901. That in cases where no appearance was made by or upon behalf of those whose names were on the tribal rolls they listed the names taking the information from the old tribal rolls; that in the case of Thlocco he couldn't say whether the initiative or first act in writing his regular census card was done by taking his name from the old card or the tribal roll, or whether some one appeared and asked for his enrollment. That in the case of Thlocco the card was completed, which meant that there was at Okmulgee on that occasion an investigation upon the question, Was he alive April 1, 1899, because that was a known prerequisite to the right of enrollment. Some cards were not completed that day in cases where the Commission was not satisfied of the right of the members to enrollment. That though they were satisfied at Okmulgee upon evidence that Barney Thlocco was living April 1, 1899, that did not preclude further investigation. That the Commission continued, after the enrolling party returned to Muskogee, to investigate the right of enrollment of all the persons whose names appeared on the cards made at Okmulgee; that that was the practice of the Commission. While the Commission was at Okmulgee seeking information for the unaccounted for Creeks, the Town Kings and Town

Warriors of the Creek Nation, who constituted the legislative branch of the government, were in session, and that the members of the council were continually going before the Commission and the enrolling clerks giving information as to whether members on the tribal rolls were living April 1, 1899, and as to their right of enrollment; that considering that Barney Thlocco's card was completed at the Okmulgee hearing he would have to say that some one must have appeared and given information as to his right to be enrolled, and that he would have to further say that following that, that there was further investigation upon the question, Was he living April 1, 1899. He said: "I never listed any man for enrollment without some information or evidence. It was our practice to have information from some direction before we would complete the card, and if we found an Indian whom we couldn't get information about with reference to April 1, 1899, we left his card incomplete." That it was their invariable custom and practice never to fill out and complete a card until they had information with respect to the question, Was he living or dead April 1, 1899. That he never enrolled any Indian arbitrarily. That he never listed any man for final enrollment solely because he was on the tribal rolls. That he required separate evidence outside of the rolls before he completed a card. That a notation on the 1895 pay roll made by

Philip B. Hopkins with reference to Barney Thlocco "Died in 1900" called his attention as enrolling clerk to the fact that Barney Thlocco was dead at the time of his enrollment. That his explanation of the fact that the final census card of Barney Thlocco does not show his death is, that there was no regular affidavit filed showing when he died, that is, proof of the date of the death. That in view of the fact that the age on the old census card is given as 40, and the new as 35, and the post-office is different, he knows that information was given him at Okmulgee. That when Thlocco and those of his class were listed for enrollment the clerks would go before Mr. Bixby, the chairman of the Commission, and go over every one of them, the chairman considering the cards and all the data furnished by the enrolling clerks before forwarding the rolls to Washington for the approval of the Secretary.

This witness said: "I repeat, and say that the Commission must have been satisfied that Thlocco was living on April 1, 1899, or the name would not have been submitted. We had information that we thought we could rely on that the person was living on April 1, 1899."

PHILIP B. HOPKINS testified that he was the chief attorney and chief clerk of the Commission and was in the enrolling party at Okmulgee. That prac-

tically the entire force interested in the Creek enrollment work was in that party. That representatives of the Creek Nation were present and the Creek attorney and that the Town Kings were present at that meeting and all endeavored to get all the information they could. That the United States Marshal and his force and field forces were constantly bringing in people. That the notation on 1895 tribal roll opposite the name of Barney Thlocco "Died in 1900" was in his handwriting; that evidently somebody gave him that information upon inquiry about Barney Thlocco. That it was intended that when the Commission came to pass on that name for final record on the roll that inquiry should be made as to when Thlocco died. That "The Commission following that meeting at Okmulgee commenced in August thereafter and continually carried on an investigation for evidence as regards each name." That there were field parties out, and that ultimately, before any tentative enrollments were sent to the Secretary to become final the Commission was satisfied on evidence that the names of the persons enrolled were entitled to enrollment; that no person was enrolled without evidence, that in fact he could not see how that could be possible, the practice of the Commission considered. That the Creek Commission and the Creek Attorney may have vouched for the party, they being present at the time to protect the tribe. That with

reference to patents the practice was to issue the patent in the name of the enrolled party unless a death affidavit was filed. That the Commission had to be satisfied. That the Commission never passed upon a card until it was completed. That the information as to a member's right to enrollment may have been picked up by piecemeal, but the practice was that the Commission must be satisfied upon evidence in every case.

E. HASTAIN, an enrolling clerk present at the Okmulgee hearing, testified substantially as Mr. Merrick, saying that when they had information that a name was entitled to go on the final rolls they completed the final roll at Okmulgee; that if they didn't have this information they didn't complete it. That Barney Thlocco's card having been completed at Okmulgee indicated that the party who wrote the card was satisfied on that date that Thlocco was living on April 1, 1899, and satisfied from evidence. That there were two classes of cases at the Okmulgee meeting: one where they were satisfied on evidence and completed the cards, and the other where the cards were left incomplete and where they were not satisfied. That so far as his knowledge went there was in all cases some evidence upon the point as to whether the citizen was living or dead on April 1, 1899, before the rolls were recommended to the Secretary

for approval, and that that was the departmental practice. That as the Commission was at work enrolling citizens at Okmulgee on the 24th day of May, 1901, and at other times while they were there, persons were continually going before the chairman of the Commission and the enrolling clerks giving information as to whether or not persons on the tribal rolls were living April 1, 1899.

JOHN G. LIEBER, contest attorney, who sometimes acted as enrolling clerk, testified that the notation on the 1895 roll "Died in 1900" meant that the clerk making the enrollment should be on his guard and make inquiry; it meant that somebody had furnished information that the party was dead and put the Commission on their guard and suggested further inquiry and investigation. That during the last two days at Okmulgee, May 24th and 25th, the Town Kings were at the council and were in the office where the enrolling was being done, and were giving all the information they knew about the Indians theretofore unaccounted for; that the Creek Attorney was there and that according to his recollection the Creek Commission was there.

TAMS BIXBY, Chairman of the Commission, the only living member of the Commission as it existed in 1901, testified that before the roll or census

card was released as final he would get the men together and go over the list; that he went over the list at different times, sometimes with one clerk and sometimes with another; that he would get the clerk that made a particular card and go over it, and before that card became final he satisfied himself that the man was entitled to enrollment. That he did not, so far as he knew, ever enroll any man without taking some evidence or acquiring some knowledge other than from the tribal rolls that he was entitled to enrollment, and that he never permitted it to be done. That his purpose was to find out whether a Creek who had died was living April 1, 1899; that he always ascertained that fact before he enrolled him; that he satisfied his mind on that subject by evidence outside of the rolls; that every name sent to the Secretary for approval had been investigated by some member of the Commission. That he was on the job all the time and that he was satisfied that every name on the rolls was entitled to be there. That he had no doubt but that investigation subsequent to the Okmulgee hearing was conducted not only as to those whose cards were incomplete but as to those who were completed also where there was any question. The field parties were sent out by the Commission to bring in evidence. That frequently the Commission had only a memorandum to go by, and frequently it was made by full-blood Indians who could not write English.

That frequently information was reported to the clerks and frequently to the Commissioners themselves. He further testified that he thought he examined every card in the Creek Nation himself personally, probably more than once; that this examination took place in the office at Muskogee after the card was made. That they made a list of the names that were questioned and sent field parties out after them to see if they were living or dead on April 1, 1899. That when he examined a card he would have with him the clerk who made the schedule. He testified: "When I took the card I went over it several times with the clerks and would find out from the clerk all the information that he had with reference to that card several times. I expect I have talked with the clerks about every card more than once." This witness by various forms of expression testified that in every case the Commission was satisfied upon the evidence that each enrolled citizen of the Creek tribe was entitled to enrollment and that he was alive April 1, 1899, and by evidence he stated that he meant something outside of and beyond the tribal rolls and old census cards. *that thousands were enrolled "name" Phoebe. R. 99*

We insist that there appear upon behalf of the government many somewhat erroneous statements of fact, made inadvertently, of course. We pray for a careful examination of the entire evidence in the

record which constitutes the summary made upon behalf of the government, from which it will appear that Barney Thlocco was regularly enrolled, not arbitrarily but upon evidence, just as thousands of others. It will appear from an examination of this evidence and from the reports of the Commission to the Five Civilized Tribes that if the enrollment of Barney Thlocco is subject to impeachment because of the manner in which he was enrolled, practically all other Indians in the Five Civilized Tribes are in the same situation.

Both Merriek and Lieber testified that the enrolling party heard much evidence on May 24, 1901, the day Thlocco was enrolled.

The testimony is in accord with the reports of the Commission such as in the Tenth Report at page 29 it is said:

“ The nearer the work approaches completion the greater the degree of care required in determining the rights of applicants for enrollment. When it is considered that no person who died prior to April 1, 1899; no child born subsequent to April 1, 1899, who died prior to July 1, 1900; no child born subsequent to July 1, 1900, who died prior to May 25, 1901; and no child who died subsequent to May 25, 1901, is entitled to enrollment, it will readily be seen that in cases of this character, where the question of date

arises, the evidence must be clear and convincing. The longer the period of time which has elapsed since the birth or death of the applicant, as the case may be, the greater the difficulty encountered in obtaining sufficient proof upon which to predicate judgment. Many of those for whom applications have been made have been clearly shown, upon examination of the witnesses under oath, not to be entitled to enrollment, and in some cases the testimony has been so overwhelmingly against enrollment that the applications have been withdrawn by the persons who made them." (Italics ours.)

Erroneous Statements of Fact in the Government's Brief.

We respectfully challenge as incorrect various statements of fact in the government's brief, such as that:

(1) It is recited with reference to the enrollment of Thlocco "Investigation ceased about May 22nd or 23rd." He was listed for enrollment May 24th. This statement, if true, would preclude the possibility of investigation having been made on the 24th. Counsel for the government cite the testimony of John G. Lieber in support of this statement. But this same witness testified: "*The last two days (May 23 and 24) at Okmulgee the Town Kings were at the Council and were in our office frequently, as*

were also different men from the different towns, giving information as to what they knew about these Indians. I think the Creek Attorney at that time was S. B. Dawes. I can't say whether he was there. In those days the Creek Nation had a Commission that attended to those enrollments, I judge it was there." The persons above named were giving information, therefore, on May 24th. (Rec., p. 93.) The testimony of Merrick, the enrolling clerk, is to the same effect. He said: "On the last three or four days before May 25, 1901, people, the Town Kings, the Town Warriors, or prominent Creeks, would appear in behalf of others and ask to have certain persons listed. * * * I would think that in all cases where the card was completed in every respect over there that some one must have appeared. I never listed any man for enrollment without some information or evidence." (Rec., p. 69.) See also record, pages 67, 70, 71 and 75.

(2) It is stated, referring to the last days of enrollment at Okmulgee: "At this time, however, all rules of practice were abandoned." We most earnestly insist that the record does not support this statement. While it is true that the Commission was making more strenuous efforts than theretofore to procure evidence and to complete the enrollment, the only difference between the practice on that oc-

casion and theretofore came to two points: *First*, the Commission did not require personal application but took the initiative and enrolled members without application upon evidence when satisfied that they were entitled thereto; *second*, persons whose names were on the tribal rolls were tentatively listed for subsequent investigation, receiving incomplete cards where the Commission was not satisfied upon proper evidence that they were entitled to enrollment. The evidence shows that in all cases where the roll cards were left incomplete for want of convincing evidence, there was a subsequent investigation so that said subsequent investigation brought that class of citizens within the regular rules excepting, only, on the point that they did not personally apply for the enrollment. Where the cards were completed upon evidence showing that the member was entitled to enrollment, there was always a subsequent investigation if there was any question about it. Whether the cards were complete or incomplete before they were forwarded to the Secretary for approval the procedure was the same as that in all the tribes and in all other uncontested cases, excepting, only, that the Commission in some cases at Okmulgee took the initiative and enrolled without personal application.

(3) It is stated that the Commission "were often imposed upon," implying, we understand, that

the Commission was often imposed upon only as to the citizens enrolled at Okmulgee. But the evidence shows that the witnesses were directing their testimony to the whole scheme of enrollment applicable to all the members of the Five Tribes and for all the enrollment period.

(4) The statement is made that on May 24, 1901, at Okmulgee citizens were arbitrarily enrolled upon whatever evidence was available. But the evidence shows *that no citizen was ever arbitrarily enrolled*, the enrolling clerk Merriek testifying positively that he never arbitrarily enrolled any citizen. The Chairman of the Commission testified to the same effect.

(5) It is stated that the evidence shows that the Commission took the judgment of the clerks on the roll cards. While such a statement appears in the testimony of one witness, it is modified and explained at pages 74, 85, 100, and elsewhere in the record, where it appears that some one of the Commissioners in every case made a personal investigation and had a conference with the enrolling clerk and reviewed the memoranda, evidence or reports of the enrolling clerks, and that the Commission as such was satisfied in each case, either upon the evidence heard before the Commission or reported to the Commission. The Chairman of the Commission himself was

Okmulgee when Thlocco was enrolled, and it appears from the evidence that he was making a personal investigation. Thlocco may have been enrolled on evidence heard personally by the Chairman of the Commission and reported by him to the Commission as a body and passed upon and approved by them.

(6) Counsel for the government state in reviewing the evidence: "There was no subsequent determination as to whether Thlocco was living on April 1, 1899. If there had been that fact would have appeared on the census card, or if sworn testimony had been taken it would have been transcribed and preserved." We respectfully suggest that counsel has misunderstood the evidence with reference to affidavits usually taken in cases where the citizen is dead. The clerk who enrolled Thlocco testified: "I would have to say that after Thlocco's name was entered on the card at Okmulgee on May 24, 1901, there was some investigation upon the question as to whether or not he was living or dead on April 1, 1899." The Chairman of the Commission testified that he personally went over all the matters of enrollment considered at Okmulgee and determined before the cards were sent to the Secretary for approval that the evidence was satisfactory.

**Erroneous Statements of Fact in the Brief Upon Be-
half of Bissett and Others.**

The brief upon behalf of Bissett and others contains many misstatements of fact which we are pleased to concede were made by inadvertence or for want of familiarity with the record. Considering the fact that the evidence is not voluminous, we invite an examination of all the evidence. Having heretofore stated, in substance, the evidence showing that Barney Thlocco was regularly enrolled, we do not deem it necessary to point out in detail the errors in the Bissett brief.

TR
WI
AN
IN
SH
TH
TIC
MA
OF
AL
EN
AN
DIS
BA

vol
ord

mis
wer
ject
may
mis

PROPOSITION ONE.

THE COMMISSION TO THE FIVE CIVILIZED TRIBES WAS A SPECIAL TRIBUNAL VESTED WITH JURISDICTION AND POWER TO HEAR AND DETERMINE THE CLAIMS OF ALL PERSONS OF THE FIVE CIVILIZED TRIBES FOR CITIZENSHIP, AND ITS ENROLLMENT OF BARNEY THLOCCO AS A CITIZEN OF THE CREEK NATION CONSTITUTES ITS JUDGMENT IN THAT MATTER, AND THIS JUDGMENT IS CONCLUSIVE OF THE FACT THAT BARNEY THLOCCO WAS A CITIZEN ON APRIL 1, 1899, AND ENTITLED TO ENROLLMENT, SINCE THE CONSIDERATION AND DECISION OF THAT QUESTION WAS INDETERMINABLE TO THE DETERMINATION OF BARNEY THLOCCO'S RIGHT TO CITIZENSHIP.

We shall discuss this principal proposition involved in the case under the following heads in the order named:

4. The tribal rolls made by the Dawes Commission approved by the Secretary of the Interior and made final by Acts of Congress and are not subject to impeachment. But if subject to attack they may be impeached only for mistake of law or a gross mistake of the facts proved or for fraud, as in public

land cases. First undertaking to show that after March 4, 1907, the rolls were not subject to impeachment upon any ground, we shall then assume, for the purposes of further argument, that they may be impeached as in public land cases.

B. The jurisdictional point involved is this: Did the Commission have power to deal with the question, Was Barney Thlocco alive April 1, 1899, to hear the particular facts relating to this question, and to determine whether or not the facts were sufficient to invoke the exercise of that power? The test of its jurisdiction is whether the Commission had power to enter upon the inquiry, not whether its conclusion in the course of it is right or wrong. It was by the exercise of precisely the same jurisdiction or power that the Commission struck some names from the Creek tribal rolls because they died before April 1, 1899, and enrolled others because they were found to be alive on that date.

The authorities cited by the government on the question of jurisdiction examined. A finding if any by the Commission that a dead man was alive is not analogous to an adjudication in an administration matter that a living man is dead.

C. The authority and jurisdiction of the Commission to the Five Civilized Tribes as defined by the authorities.

D. The complainant pleaded and attempted to prove only a mistake of law. No mistake of fact was alleged or proved; nor is there any issue of fraud involved.

E. If the finding of the Commission was based upon any evidence, the action of the Commission enrolling Thlocco is conclusive. The courts cannot inquire into the extent of investigation made by the Commission. The enrollment of Thlocco is a determination or judgment not only that he had the right to be enrolled, but that he was enrolled in the manner required by law. The trial court held properly that the government must prove first of all that there was no evidence before the Commission before a retrial of the issue passed upon by the Commission. The trial court's opinion on the evidence set forth.

F. In absence of the evidence adduced before the Commission the courts will presume that there was legal, competent and relevant evidence to support each finding of the Commission.

G. The burden is upon the complainant, however difficult the undertaking, to prove a negative, namely, that there was no evidence before the Commission upon the question, Was Barney Thlocco alive April 1, 1899. It must be admitted that the evidence upon behalf of the government does not even tend to show that Thlocco was enrolled without evidence.

H. The judgment of the Commission may be rebutted only by full, clear, convincing and unambiguous proof that there was no evidence before the Commission to sustain its finding.

I. The jurisdiction of the Commission was analogous to the jurisdiction of the land department of the government in land cases, but the Commission's findings more nearly approached the dignity, sanctity and conclusiveness of a court decree.

J. The Commission was authorized "to detail clerks to aid in the performance of their duties" and "to use every fair and reasonable means within their reach" for the purpose of making the final rolls. If the Commission had enrolled Thlocco upon evidence heard by a clerk the enrollment nevertheless would have been *quasi-judicial* and not merely administrative. But the Commission as a body "thoroughly examined the evidence" and from the evidence enrolled Thlocco.

K. The Creek Nation was represented by an attorney and by head men of the tribe at the time of Thlocco's enrollment. If the hearing was *ex parte* it was such only as to the heirs and not as to the government or the Creek Nation.

L. To sustain the government would be to destroy rules of property established by the uniform

sions of the Circuit Court of Appeals for the
fifth Circuit extending over a period of seventeen
years, to destroy utterly many land titles in the hands
of innocent purchasers, and to cloud hopelessly many
thousands of titles without so much as a forum, ex-
cept at the will of the government as complainant, to
test their validity.

M. The government asks for the establishment
of a new rule which would permit the United States
a court of equity to retry a question of fact al-
ready passed upon by a land department of the gov-
ernment without first impeaching the finding of the
department upon one of the recognized grounds of
reversal, namely, for error of law, gross mistake of
fact, or for fraud.

N. The hearing in the case of Thlocco was ex-
actly the same as in all other uncontested cases.
Thlocco was "accounted for" at a hearing at Okmul-
gee, the capital of the Creek Nation, though subse-
quent investigation was made to verify the conclu-
sion reached at the Okmulgee hearing. The presump-
tion of continued life considered. The high points
of the government's testimony showing that Thlocco
enrolled regularly, restated.

A .

The tribal rolls made by the Daves Commission approved by the Secretary of the Interior were made final by Acts of Congress and are not subject to impeachment. But if subject to attack they may be impeached only for mistake of law or a gross mistake of the facts proved, or for fraud, as in public land cases. First undertaking to show that after March 4, 1907, the rolls were not subject to impeachment upon any ground, we shall then assume, for the purposes of further argument, that they may be impeached as in public land cases.

Prior to the time when the government undertook to break up the tribal relations and to partition the tribal property, the Five Civilized Tribes exercised the right to enroll their members. The various old rolls of the tribes were made up under the direction and supervision of the tribal councils. No applicant for citizenship in either of the five tribes had the privilege of going into court prior to the legislation by Congress hereinafter referred to for the purpose of establishing his right to enrollment, and no one so much as thought of resorting to a court to prevent the enrollment of anyone claiming to be a member of the tribe. Those who are familiar with the history of the Indian Territory are familiar with the custom that obtained for many years prior to 1896 of lobbying through the tribal councils the claims

of those seeking citizenship in the tribes. This right in the tribal legislative bodies to pass upon all questions of citizenship existed until the Act of June 10, 1896. In *Wallace v. Adams*, 143 Fed. 716, 723, the court said:

“ The United States by its superior might took from the Choctaw and Chickasaw Nations the power to determine who their citizens should be, which had been repeatedly guaranteed to them by treaties, and authorized the Dawes Commission and the United States Court in the Indian Territory to decide this issue, by the Act of June 10, 1896. Here is the origin of every right of the defendant involved in this action. The maintenance by him of any claim in any court necessarily concedes the power of the legislative department of the government to create or to revive, and to enforce his demand for citizenship, because without that concession, the provisions of the Act of June 10, 1896, in this regard are void, and the defendant's claim is conclusively adjudged to be baseless by its rejection by the Choctaw Nation. But, if the legislative department of the United States had the constitutional power to create or to revive the defendant's claim and to enforce it, it necessarily had the same power to determine whether or not it would revive or enforce it and to select its own method of deciding these questions. It might have determined this issue itself and have declared by direct enactment that the defendant Hill was a citizen of the Choctaw Nation. It

might have empowered a committee, an Indian agent, a commission, a board, or a court to examine and determine that question on its behalf, and as the determination of this question of citizenship was a purely legislative and administrative function, and not a judicial one, Congress necessarily had the authority under the Constitution at any time before an allotment of land under its previous acts had been finally made to the defendant, and his right to the land had thereby become vested, to repeal its previous legislation, to change its method of determining the issue, to strike down any decision that had been made under its previous acts, to prescribe a new method of deciding the question, or to refuse to determine it altogether and leave the claim of the defendant as it found it, conclusively barred by its rejection by the Choctaw Nation."

The Act of June 10, 1896 (29 Stat. 321), provided for the continuance of the Commission to the Five Civilized Tribes, and further provides :

" Said Commission is directed to continue the exercise of the authority already conferred upon them by law and endeavor to accomplish the objects heretofore prescribed to them and report from time to time to Congress.

" That said Commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said na-

tions and after such hearing they shall determine the right of such applicant to be so admitted and enrolled :

“ *Provided, however,* That such application shall be made to such Commissioners within three months after the passage of this act.

“ The said Commission shall decide all such applications within ninety days after the same shall be made.

“ That in determining all such applications said Commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nations or tribes :

“ *And provided, further,* That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.

“ In the performance of such duties said Commission shall have power and authority to administer oaths, to issue process for and compel

the attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now residing beyond the limits of said territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes:

“ *Provided*, That if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the Commission provided for in this act, it or he may appeal from such decision to the United States District Court.

“ *Provided, however*, That the appeal shall be taken within sixty days, and the judgment of the court shall be final.

“ That the said Commission, after the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose right may be conferred under this act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States Courts, as provided herein.

“ The Commission is hereby required to file the lists of members as they finally approve them

with the Commissioner of Indian Affairs to remain there for use as the final judgment of the duly constituted authorities.

“ And said Commission shall also make a roll of freedmen entitled to citizenship in said tribes and shall include their names in the lists of members to be filed with the Commissioner of Indian Affairs.”

This act gave the United States District Court appellate jurisdiction over the decisions of the Commission. A great number of appeals were taken under this provision especially in the Choctaw and Chickasaw Nations. The United States Court held that it should try these cases *de novo* upon appeal and hear not only the evidence that was introduced before the Commission but any other evidence that might be offered upon the part of every applicant for enrollment by the different nations. The applicants, of course, were vigilant and active in procuring testimony and were represented by counsel who pressed each individual case, while the nations were represented by one or two men who had charge of all the cases upon the part of the nations and who were not very active in their opposition of the enrollment of these applicants. The result was that a very large number of applicants, who had been rejected by the Commission were placed on the rolls by the court. Thereupon the different tribes formed the opinion

that the courts were against them in the enrollment of citizens and it was the general belief in the Indian Territory that a large number of people had procured many of the judgments of the courts enrolling individuals by fraud and perjured testimony. This statement is made without any purpose or intention of reflecting upon the courts who rendered these judgments. These courts were as honorable and able as any courts in the country, but at that time people were not well acquainted in the Indian Territory, and the courts knew little about the character of the witnesses testifying, and there was not sufficient activity upon the part of the tribes to produce evidence which would have disclosed the fraud and perjury of the applicants for enrollment.

These conditions brought discredit upon the entire fraternity of court citizens. In fact, so much so that in the Choctaw and Chickasaw Nations, the Supplemental Agreement of 1902 provided a means by which the right of these court citizens to enrollment could be, and was, again contested, and a large number of them stricken from the rolls notwithstanding their claim that the judgment of the United States Court in the Indian Territory was final and could not be attacked. In fact, a number of those stricken were Indians and as much entitled to enrollment as hundreds and thousands of others whose enrollment was never questioned.

was
out
in th
tribe
Com
Inter
cond
and t
made
vides

When the Act of June 28th, 1898 (30 Stat. 495), passed the prejudice against the courts arising from the conditions just described, was very strong in the minds of the people in power in the various States, and it was also strong in the minds of the members of the Five Civilized Tribes and in the War Department, and it was in view of these conditions that the Act of June 28th, 1898, was passed. The various treaties subsequent to that time, were in accordance with Section 21 of the Act of June 28, 1898, pro-

That in making rolls of citizenship of the various tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens as of the year eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding Acts of Congress, and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said rolls to persons whose names are found thereon; and all who have heretofore made permanent settlement in the Cherokee Nation whose parents, by reason of their Cherokee blood, have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other roll and omit all such as may have been placed thereon by fraud or without authority of

law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, and with such intermarried white persons as may be entitled to citizenship under Cherokee laws.

“ It shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six.

“ Said Commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and laws of said tribes.

“ Said Commission shall have authority to determine the identity of Choctaw Indians claiming rights in the Choctaw lands under article fourteen of the treaty between the United States and the Choctaw Nation concluded September twenty-seventh, eighteen hundred and thirty, and to that end they may administer oaths, examine witnesses, and perform all other acts necessary thereto and make report to the Secretary of the Interior.

“ The roll of Creek freedmen made by H. W. Dunn, under authority of the United States,

pri
six
mis
ing
des
per
suc
hav
tho
“
fre
ties
thei
the
“
fre
der
sixty
taw
born
fort
den
each
thei
min
vide
“
tern
son
and
mon
agro
enti

to March fourteenth, eighteen hundred and seven, is hereby confirmed, and said commission is directed to enroll all persons now living whose names are found on said rolls, and all descendants born since the date of said roll to persons whose names are found thereon, with other persons of African descent as may have been rightfully admitted by the lawful authorities of the Creek Nation.

It shall make a correct roll of all Choctaw men entitled to citizenship under the treaties and laws of the Choctaw Nation, and all descendants born to them since the date of treaty.

It shall make a correct roll of Chickasaw men entitled to any rights or benefits under the treaty made in eighteen hundred and six between the United States and the Choctaw and Chickasaw tribes and their descendants to them since the date of said treaty and acres of land, including their present residences and improvements, shall be allotted to them to be selected, held, and used by them until their rights under said treaty shall be determined in such manner as shall be hereafter provided by Congress.

The several tribes may, by agreement, determine the rights of persons who for any reason may claim citizenship in two or more tribes, as to allotment of lands and distribution of lands belonging to each tribe; but if no such agreement be made, then such claimant shall be entitled to such rights in one tribe only, and may

elect in which tribe he will take such right; but if he fail or refuse to make such selection in due time, he shall be enrolled in the tribe with whom he has resided, and there be given such allotment and distributions, and not elsewhere.

“ No person shall be enrolled who has not heretofore removed to and in good faith settled in the nation in which he claims citizenship:

“ *Provided, however,* That nothing contained in this act shall be so construed as to militate against any rights or privileges which the Mississippi Choctaws may have under the laws of or treaties with the United States.

“ Said Commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls. They shall have access to all rolls and records of the several tribes, and the United States Court in Indian Territory shall have jurisdiction to compel the officers of the tribal governments and custodians of such rolls and records to deliver same to said Commission, and on their refusal or failure to do so to punish them as for contempt; as also to require all citizens of said tribes, and persons who should be so enrolled, to appear before said Commission for enrollment, at such times and places as may be fixed by said Commission, and to enforce obedience of all others concerned, so far as the same may be necessary, to enable said Commission to make

tion 2
the F
the ol
by fra
furthe
that s
make

rolls as herein required, and to punish anyone who may in any manner or by any means obstruct said work.

The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to local laws, shall alone constitute the several tribes which they represent.

The members of said Commission shall, in performing all duties required of them by law, have authority to administer oaths, examine witnesses, and send for persons and papers and any person who shall wilfully and knowingly make any false affidavit, or oath to any material fact in any matter before any other officer authorized to administer oaths, to any affidavit or other paper to be filed or oath taken before said Commission, shall be deemed guilty of perjury, and on conviction thereof shall be punished as for such offense."

It will be seen that the first paragraph of section 1 of the above act gives to the Commission to the Civilized Tribes authority to strike from the rolls the names of all persons placed thereon with or without authority of law. This section repeats upon this proposition and provides that the Commission is authorized and directed to correct rolls of the citizens by blood of all the

other tribes eliminating therefrom "such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made."

This section further provides:

" Said Commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls. They shall have access to all rolls and records of the several tribes, and the United States Court in Indian Territory shall have jurisdiction to compel the officers of the tribal government and custodians of such rolls and records to deliver same to said Commission, and on their refusal or failure to do so to punish them as for contempt; as also to require all citizens of said tribes, and persons who should be so enrolled, to appear before said Commission for enrollment, at such times and places as may be fixed by said Commission, and to enforce obedience of all others concerned, so far as the same may be necessary to enable said Commission to make rolls as herein required, and to punish anyone who may in any manner or by any means obstruct said work."

This section further provides that:

“ The members of said Commission shall, in performing all duties required of them by law, have authority to administer oaths, examine witnesses, and send for persons and papers and any person who shall wilfully and knowingly make any false affidavit or oath to any material fact or matter before any member of said Commission, or before any other officer authorized to administer oaths, to any affidavit or other paper to be filed or oath taken before said Commission, shall be deemed guilty of perjury, and on conviction thereof shall be punished as for such offense.”

A consideration of these provisions of the section just quoted, indicates clearly that the Commission was vested with much more power than is usually conferred upon such bodies. It was required to make the rolls; it was required to make correct rolls and it was given the authority, where necessary to correct the rolls, to strike names from old rolls that had been placed thereon by fraud or without authority of law. In other words, it was given full judicial jurisdiction and it was given all the means to inquire into these facts that any court would have.

In making these rolls, the Commission was the superior. It was the purpose of the government to complete a census of the different tribes so that the lands

could be allotted. It has been considered that the division of the property to the different tribes was in the nature of a partition and that prior to the partition, the members held an interest in the property in the nature of a coparcenary interest.

See *Shulthis v. McDougal*, 170 Fed. 529.

In order to ascertain who were the coparceners or people entitled to share in this estate, it was necessary to take a census. *It was the government who was the moving party in making the allotments in the Indian Territory and in order to make the allotments the government had to find out who the members were and the government was the actor in the whole matter.* But it must be remembered that while the Government of the United States was the active agency to ascertain the facts upon which the enrollment judgment should be predicated, it performed this work through the Dawes Commission, a judicial body created and selected under solemn compact between the United States Government and the Creek people. (See SANBORN'S opinion, *Folk v. United States*, 233 Fed., bottom page 192.)

If a person goes into court, brings his suit, sends out and gets his witnesses, and upon the suit brought by him where he brings his own witnesses, a judgment is rendered, he cannot attack that judgment.

In enrolling the members of the tribe, the government designated the procedure, furnished the tribunal, regulated the introduction of evidence and had full power and authority to investigate all matters of fraud or illegality. The Commission as a special tribunal was ordered and directed to do this.

Remembering then, the conditions under which this act was passed and the fact that the courts in the Indian Territory were being criticized because of their action in admitting the so-called "court citizens," and remembering too, the duties imposed upon the Commission and the authority vested in the Commission with reference to enrollment, let us read this portion of section 21 of the Act of 1898:

" The rolls so made, when approved by the Secretary of the Interior, *shall be final*, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent."

The Original Creek Agreement, Act of March 1, 1901 (31 Stat. 861), provides in section 28, as follows:

" No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.

“ All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled ‘An Act for the protection of the people of the Indian Territory, and for other purposes,’ shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and moneys to which he would be entitled, if living, shall descend to his heirs, according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

“ All children born to citizens so entitled to enrollment up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said Commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

“ The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons.”

The Indian Appropriation Bill of March 3, 1901 (31 Stat. 1058, 1077), provides:

“ The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent.”

The continual use of the word “final” in these statutes is very significant. It may be argued that because the Act of 1896 gave the right of appeal from the Commission to the court that the use of the word “final” was meant merely to indicate that there should be no appeal as a matter of course or right. But this argument is not sound. There is never any appeal as a matter of right from a commission or other *quasi*-judicial body unless specially authorized by statute. The judgment or finding of the Commission would have been final in the sense that there would have been no appeal therefrom to the courts, without the use of the word “final.” The word “final” was used in this statute to indicate that the matter could go no further, that the judgment of the Commission was binding and that it was not reviewable. If it meant less than this, it was not necessary. A judgment of any court having jurisdiction of the subject matter is final until appealed from, and nobody would question its finality in that sense.

The word "final" as used in these various statutes mean conclusive or something that will irrevocably fix the rights of the parties. That this is true is emphasized by the following language of section 28 of the Creek Treaty (Act March 1, 1901, 31 Stat. 861), as follows:

" The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the *final rolls of citizenship of said tribes, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons.*"

And also by the language already quoted from section 2 of the Indian Appropriation Bill of March 3rd, 1901 (31 Stat. 1058, 1077), to-wit:

" The rolls made by the Commission to the Five Civilized Tribes, *when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent.*"

The meaning of the word "final" of course, depends upon the context of the sentence to some extent, but when used as used in this statute, it means conclusive. See:

Sharon v. Hill, 26 Fed. 337-389;

Rindeau, v. Beaumette, 4 Minn. 224;
Blanding v. Sayles, 49 Atl. 992, 23 R. L. 226,
and
Appeal of Bixler, 59 Cal. 550.

The fact that at the time of the passage of this act there was great dissatisfaction with the courts in the Indian Territory in admitting persons to citizenship, who had been excluded therefrom by the Commission to the Five Civilized Tribes; the fact that it was necessary to complete the enrollment of the different tribes at an early date in order to allot their lands; the fact that the Commission to the Five Civilized Tribes was given full authority and jurisdiction and ample machinery to make a full and complete investigation of the right of their application for membership in the tribe and was required to make investigation of the rights of all persons, whether these persons were seeking enrollment or not so that the rolls might be completed, taken together with the use of the word "final" repeated as it was in these statutes, indicates clearly that Congress did not intend for the courts to have anything to do with enrolling or refusing to enroll any members of the tribes.

It is a matter of public history that while the enrollments were being made, the courts scrupulously and continually refused to interfere in any way what-

ever with the enrolling or refusing to enroll any person as a member of the tribes. It appears there is no escape from the conclusion that Congress meant that the action of the Commission should be really final in the sense that no court should at any time undertake to undo what the Commission had already done.

The government's position on this point is impossible, would lead to intolerable confusion, and, we respectfully submit, is absurd, for reasons which may be briefly stated thus: Admitting that the Commission had the jurisdiction to pass upon the question and find that a member of the tribe who was actually alive April 1, 1899, was dead, the government denies that the Commission had the power upon hearing the evidence relating to the question to adjudge a member of the tribe as alive April 1, 1899, if, in fact, he died before that date. *If the Commission could bar from the final rolls a member of the tribe actually alive April 1, 1899, it could, in the exercise of that same jurisdiction, enroll as one of the units for final allotment a member of the tribe who had died prior to that date. The power to exclude is precisely the same as the power to include.* The reports of the Commission to the Five Civilized Tribes of which this court will take notice, show that many thousand members of the various tribes died about

dates at which members had to be alive in order to be entitled to enrollment, and the Commission reports that it became necessary *to investigate carefully all of these cases, to hear the evidence relating thereto and to pass judicial judgment in each case upon the question, Was the member alive on the date named for closing the rolls?* How can it be said, with any show of reason, that the Commission was without the jurisdiction to find one actually alive April 1, 1899, as dead, and to deny him enrollment? Certainly this was done in many cases. *Is authority to exclude and thereby finally pass upon the question has never been denied. But does the jurisdiction to decide against a member of the tribe always include the power to decide for him?* Out of a hundred and forty thousand alleged members of the tribe, either in person or by their heirs, excluded for citizenship in the Five Civilized Tribes and were refused by the Commission. Have their rights been adjudicated? Must the entire matter of citizenship be opened again? Have the courts the right to correct the mistakes made by the Dawes Commission except as in public land cases? If the courts do have such jurisdiction, then it must follow the case of these hundred and forty thousand persons that the question of their right to citizenship in the tribes is still open; and they in person or their heirs have the right to have their claims determined

by a tribunal with power to pass upon the question. If this court sustains the government, these claimants will arise to contend for their rights either in the courts or seek relief through Congress. If their claims have not been passed upon authoritatively the policy of the government will not permit that they be barred from participating in the final distribution of the tribal property without an opportunity to be heard before a tribunal with the jurisdiction to determine their claims. This vast number of claimants were excluded from citizenship in the Five Tribes in the exercise of precisely the same power that admitted Thlocco to enrollment. *If the Commission could make a mistake against an applicant and render final judgment against him, certainly, in the exercise of the same authority, it could make a mistake in favor of an applicant; otherwise there can be no end to these matters.*

The government must either abandon its action or take the position that the enrollment and allotment of Thlocco were absolutely null and void, assuming that in fact he died prior to April 1, 1899. But this position *would strike from the statutes above quoted the various provisions making the rolls "final."* *If the position of the government is sound, then in every case where in fact the allottee died before the date for closing the rolls, the entire*

proceed
statutes
have no
strike d
meaning
others o
of argum
shall be
operatio
ment fin
ernment
Thlocco
be impe
take of
not argu
"final"

Let
ernment
was abso
edge and
many th
near the
Five Tr
mistake
ly void,
terly voi
land can

of the Commission was a nullity and the making the enrollment of such persons final effect whatever. But the courts do not own statutes of this sort and make them pass. Take the case of Thlocco and many of his class: Let it be admitted for the sake of argument that he died before April 1, 1899. What would be said as to him and his class as regards the effect of the above statutes making the enrollment final? We propound to counsel for the government: *In what respect are the rolls "final" as to those of his class if their enrollment can be annulled without showing fraud or gross misfeasance or facts proved or error of law?* We need not go at length the proposition that the word "final" must be given some effect.

Let us consider the practical effect of the government's contention that the enrollment of Thlocco is entirely void. It is a matter of common knowledge shown by the Commission's reports that thousands were enrolled whose death occurred before the dates for closing the respective rolls of the classes. If the doctrine is established that a void renders the enrollment and allotment utterly void, then it must follow that the patents are utterly void, that not even innocent purchasers of the land can be protected. What is to become of the

thousands of innocent purchasers who have bought these lands relying upon the judgments of the Commission? If the government prevails, no lawyer in the east half of Oklahoma can ever pass a land title as good where it appears that the death of the allottee occurred near the date for closing the rolls. In an administration case the state court might hear the evidence, determine the heirs and adjudge the date of the allottee's death and fix that date at a time sustaining the title, but such decree would not bind the government, which might bring a suit at any time for the use of the members of the tribe. *To sustain the government is to strike down all the titles in every case where the Commission made a mistake, it matters not how great the investigation or how weighty the testimony tending to show that the allottee was alive at the date fixed for closing the rolls. Such a conclusion, if reached by this court, would produce intolerable conditions and so impair many of the Indian titles that no prudent purchaser would seriously consider a purchase.*

The position of the government, stated in another manner, is this: Though the Commission to the Five Civilized Tribes may have had substantial and convincing evidence, though they may have proceeded with all the care and caution that characterizes a court of equity, nevertheless if the govern-

seems that there has been discovered at this late more weighty evidence tending to show Thlocco died before April 1, 1899, the courts try the question, Was Thlocco alive April 1, 1899. An examination of all the evidence introduced by the government shows conclusively that the Commission did pass upon Thlocco's right to enrollment *in 1899*. Counsel for the government say they have no other evidence. If the judgment of the Commission was not final the court decree in this case would not be final. Let us suppose that the government's case is sustained and the case is tried and that the court finds that Thlocco was alive April 1, 1899, the evidence being conflicting, as it would certainly be if there is a trial. Let us further suppose that after the judgment in favor of the heirs becomes final the government discovers most positive evidence showing that Thlocco died before April 1, 1899, what would prevent the prosecution of another case against the heirs? *If the theory of the government is correct, the court has no jurisdiction by which to establish the right of Thlocco to an allotment. If the Commission had no authority to admit a dead man as alive, the court has no jurisdiction to determine that a dead man was alive. There would be no end to these contentions if the government succeeds.*

In this matter there is only one of three decisions possible. *First*. It may be held that the question of citizenship in the tribe was a political one and therefore not subject to impeachment upon any ground whatever after March 4, 1907, the date for closing the rolls; or, *second*, it may be held that the rolls made by the Dawes Commission approved by the Secretary of the Interior were made final by acts of Congress and therefore are not subject to impeachment upon any ground; or, *third*, the court may adopt the view of the Circuit Court of Appeals for the Eighth Circuit announced in a line of decisions extending over a period of almost twenty years, and hold that the question of citizenship in the tribe was judicial and that the findings of the Commission may be impeached as in land cases for error of law, gross mistake of the facts proved or for fraud, but upon no other ground.

We do not believe that our contention that the rolls are impervious to attack is in conflict with *United States ex rel Lowe v. Fisher*, 223 U. S. 95, 56 L. ed. 364, where it was held that the Secretary of the Interior, prior to March 4, 1907, by reason of express statutes, had the authority after due notice to the allottee and a hearing to cancel his enrollment; for the court found this authority in the statutes which gave the Secretary revisory and correct-

power over the rolls until March 4, 1907. There is no statutory authority for this action.

Having presented our contention that the rolls are final and not subject to impeachment upon any ground, we shall, during the further course of this brief, assume, for the purposes of argument, that the rolls may be impeached in proper cases.

B

The jurisdictional point involved is this: Did the Commission have power to deal with the question, as Barney Thlocco alive April 1, 1899, to hear the particular facts relating to this question, and to determine whether or not the facts were sufficient to invoke the exercise of that power? The test of its jurisdiction is whether the Commission had power to enter upon the inquiry, not whether its conclusion in the course of it is right or wrong. It was by the exercise of precisely the same jurisdiction or power that the Commission struck some names from the Creek tribal rolls because they died before April 1, 1899, and enrolled others because they were found to be alive on that date.

The authorities cited by the government on the question of jurisdiction examined. A finding by the Commission that a dead man was alive is not analo-

gous to an adjudication in an administration matter that a living man is dead.

—*United States v. Winona & St. P. R. Co.*, 15 C. C. A. 96, 67 Fed. 948;

United States v. Northern Pac. R. Co., 37 C. C. A. 290, 95 Fed. 864;

French v. Fyan, 93 U. S. 169, 23 L. ed. 812;

New Dunderberg Min. Co. v. Old, 25 C. C. A. 116, 79 Fed. 598;

Noble v. Union River Log. Co., 147 U. S. 164, 37 L. ed. 123;

United States v. Schurz, 12 Otto. 378, 102 U. S. 273, 26 L. ed. 167;

St. Louis Smelting Co. v. Kemp, 14 Otto. 636, 104 U. S. 636, 26 L. ed. 875;

Folk v. United States, 233 Fed. 177.

See, also, authorities under "C—The authority and jurisdiction of the Commission to the Five Civilized Tribes as defined by the authorities."

Shall the Court Become a Dawes Commission?

The case of *Folk v. United States*, 233 Fed. 177, by the Circuit Court of Appeals for the Eighth Circuit, covers this entire question so fully that we invite the examination of that case in its entirety. It involved the allotment of Thomas Atkins. The government charged, as in this case, that Thomas Atkins was not alive April 1, 1899, but failed to show

that the Commission enrolled Atkins arbitrarily and without evidence, just as the government failed here. The Court of Appeals, in a most exhaustive and learned opinion, reviewed the acts of Congress conferring jurisdiction upon the Dawes Commission for the enrollment of the Indians and the allotment of the lands in the Five Civilized Tribes, followed and approved the opinions theretofore handed down by that court extending over a period of many years, and declared that the Dawes Commission was a special tribunal created to hear and determine the questions here sought to be retried, holding the test of the jurisdiction was not whether the Commission decided right or wrong, but whether it had the power to enter upon the inquiry of the matter decided. The Commission found that Atkins was alive April 1, 1899, and its judgment was held conclusive and not subject to collateral attack. *The Circuit Court of Appeals has held for seventeen years that the courts will not do the work of the Dawes Commission.*

The fundamental error of the government, it seems to us, is the failure to distinguish between the want of jurisdiction and a wrong conclusion reached in the exercise of jurisdiction. The question whether the finding of the Commission was wrong, is not here involved. The real point involved is: Did the Commission have the authority to deal with the question,

Was Barney Thlocco alive April 1, 1899? Did the Commission have the authority to hear the particular facts relating to the question, Was Barney Thlocco alive April 1, 1899? Did the Commission have the authority to determine whether or not the facts before the Commission were sufficient to invoke the exercise of the Commission's power? The unfailing test of jurisdiction in such a matter is, Did the Commission have power to enter upon the inquiry? Since Congress had provided that all Creek citizens who were living April 1, 1899, should be enrolled and should be entitled to allotments and that all of the lands of the Creek Nation and the funds of the Creek Tribe should be distributed to such enrolled citizens, the same being regarded as units for the distribution of the tribal property, and since it was further provided that if any citizen entitled to enrollment and allotment died before receiving his lands and his distributive share of the funds of the tribe that the same should be allotted and distributed to his heirs, it became necessary to commit to some tribunal the matter of making the tribal rolls and the determination in every case where the citizen had died whether or not the death occurred before April 1, 1899. Such determination of the date of the death of the citizen was a prerequisite to the right of enrollment in every case. It is a matter of common knowledge that the Creek people were dying rapidly. Some point of

time had to be fixed for the distribution of the property of the tribe, and some authority had to have full and complete jurisdiction to inquire into every case of death and to determine whether or not the citizen was living on April 1, 1899. *The authority of the Commission to the Five Civilized Tribes to deal with the question, Was Barney Thlocco alive April 1, 1899? the power and duty to hear the particular facts relating to that question and to determine that question of fact, constitutes its jurisdiction in this matter.*

The case of *United States v. Winona & St. P. R. Co.*, 15 C. C. A. 96, 67 Fed. 948, defines the jurisdiction of the land department of the government. It was there held:

“ Jurisdiction of the subject matter is the power to deal with a general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. *The test of jurisdiction is whether the tribunal has power to enter upon inquiry, not whether its conclusion in the course of it is right or wrong.*” (Italics ours.)

In the *Winona* case, the Circuit Court of Appeals for the Eighth Circuit, in its opinion by Judge SANBORN, after reviewing the authorities, announced that the decisions are in harmony with the following

rules: (1) A patent or certificate of the land department over which the land department has no power of disposition and no jurisdiction to determine the claims of applicants for, is void. (2) A patent or certificate of the land department to land over which the department has the power of disposition and the jurisdiction to determine who will take it, is not void, but conveys the title. (3) That a court of equity may, in a direct proceeding for that purpose, set aside a certificate or patent for error of law, for gross mistake of the facts proved, or for fraud.

The *Winona* case was brought by the United States against the railroad to set aside the certification from the United States to the State of Minnesota of certain lands. The bill was grounded on the fact that at the respective times of the location of the railroad, homestead entries or preemption filings had been made upon the lands, so that the same were excepted from the grant to the state for the benefit of the railroad company. The existence of the homestead entries and preemption filings was conceded by the appellees, their defense being that the certification of the lands to the state for the benefit of the railroad conveyed the legal title, and that the complainant had to impeach the patent by proving either a mistake of law, a gross mistake of fact, or fraud. In answering the contention that the land was not

subject to the jurisdiction of the land department, this court said, after referring to the well known rules for attacking a patent:

“ These propositions are not seriously questioned by counsel for the government, but his contention is that the land department was without jurisdiction to decide whether these lands fell within the grants to the railroad company, and rightfully belonged to it, or were excepted from these grants, and were open to pre-emption, homestead, and purchase by other parties; and he maintains that, since this department was without jurisdiction to decide this question, the certificates to the state which it delivered were issued without authority, and were absolutely void. In support of these views, he has cited many authorities from the decisions of the Supreme Court, but a careful examination of these decisions has convinced us that they do not rule this case. They are cases in which the power to hear and determine the claims of the parties to the land in controversy, and to convey it to the rightful claimant, was not vested in the land department when it rendered its decision and made its conveyance. They are cases in which the title to the land patented or certified had passed out of the government, and hence was not within the jurisdiction of the officers of the land department when that tribunal decided and attempted to convey it, as in *Polk v. Wendal*, 9 Cranch, 87; *Stoddard v. Chambers*, 2 How. 284, 318; *Easton v. Salisbury*,

21 How. 426, 432; *Reichart v. Felps*, 6 Wall. 160; *Best v. Polk*, 18 Wall. 112, 117, 118; *Sherman v. Buick*, 93 U. S. 209; *Iron Co. v. Cunningham*, 15 Sup. Ct. 103; or cases in which the land was reserved from sale or disposition by the land department until a claim under a Mexican or Spanish grant should be determined, and the power to determine the extent and validity of this claim had been conferred upon tribunals other than the land department, and the final decisions of those tribunals had not been made when the claim of the patentee was initiated, as in *Doolan v. Carr*, 125 U. S. 618, 624, 632, 8 Sup. Ct. 1228; or cases in which the land had been set apart as a portion of a military or other like reservation, and had thus ceased to be a part of the public domain, subject to sale or other disposition by the officers of the land department, as in *U. S. v. Stone*, 2 Wall. 525, 527, and *Wilcox v. Jackson*, 13 Pet. 499, 511. In all these cases the land that was the subject matter of the patents or certificates, and the rights of the claimants to it, were not subject to the jurisdiction of the land department. That department had no jurisdiction to hear and determine these claims, or upon such determination to dispose of the lands. On the other hand, in every case to which our attention has been called, in which the power to hear and determine the claims of applicants for lands of the United States, and upon such determination to dispose of those lands, either under the pre-emption or homestead laws, under grants for railroads or other corporations, or by sale, or

in any other recognized mode, has been vested in the land department, the Supreme Court has uniformly held that patent or certificate issued from the department conveyed the legal title, and was not subject to collateral attack. *Minter v. Crommelin*, 18 How. 87, 89; *U. S. v. Schurz*, 102 U. S. 378, 401; *French v. Fyan*, 93 U. S. 169, 172; *Quinby v. Conlan*, 104 U. S. 420; *Smelting Co. v. Kemp*, 104 U. S. 636, 645-647; *Steel v. Refining Co.*, 106 U. S. 447, 450, 452, 1 Sup. Ct. 389; *Heath v. Wallace*, 138 U. S. 573, 585, 11 Sup. Ct. 380; *Knight v. Association*, 142 U. S. 161, 212, 12 Sup. Ct. 258; *Noble v. Railroad Co.*, 147 U. S. 174, 13 Sup. Ct. 271; *Barden v. Railroad Co.*, 154 U. S. 288, 14 Sup. Ct. 1030.

“ The distinction between the two classes of cases is well illustrated by *Best v. Polk*, 18 Wall. 112, 117, 118, and *Minter v. Crommelin*, 18 How. 89. In the former case a tract of land was sold by the land department, and patented to a purchaser in 1847. But a Chickasaw Chief had perfected his title to this land in 1839, under the provisions of a treaty between the United States and the Chickasaw Indians. The Supreme Court held the patent void, because the title to the land had passed out of the United States before the claim of the patentee was initiated, and hence the officers of the land department had no jurisdiction over the subject-matter of the patent. But in the latter case the land patented to a pre-emptor had been reserved by Act of Congress to a Creek warrior, but the act provided that, if the warrior abandoned his reservation, it should

be forfeited, and the Secretary of the Interior might order its sale. The Supreme Court held that the patent was *prima facie* evidence that the warrior had abandoned his reservation, that the Secretary had ordered the sale, and that the legal title had passed to the pre-emptor.

“ Another striking illustration of this distinction is found in *Doolan v. Carr*, 125 U. S. 618, 630, 8 Sup. Ct. 1228, and *Quinby v. Conlan*, 104 U. S. 420. In the former case, the plaintiff, Carr, brought ejectment in reliance upon a title derived from a patent issued to the Central Pacific Railroad Company in 1874 under the Pacific Railroad acts. Those acts excepted from their grants to the railroad company the lands claimed under Mexican or Spanish grants. By the Act of March 3, 1851 (9 Stat. 632), a commission had been created to determine the extent and validity of such claims under Mexican grants. An appeal was allowed by that act from the decision of the commission to the District Court of California, and from the decision of that court to the Supreme Court of the United States. The land patented to the Central Pacific Railroad Company in that case was within the limits of a claim under a Mexican grant, which was in litigation before some of these tribunals when the grants were made to the Central Pacific Railroad Company, and when the line of its railroad was definitely fixed, and the claim under the grant was finally sustained by the Supreme Court long after those dates. The jurisdiction to hear and determine the claim to this land un-

the Mexican grant had been conferred by Act of Congress upon tribunals other than the land department; and the court held that the patent issued to the railroad company by that department was absolutely void, and its action to eject the plaintiff from the premises without jurisdiction or authority. But in *Quinby v. Conlan* (an action of ejectment), the patent under which the plaintiff claimed was attacked by an attempt to show that the land was within a reservation under a Mexican grant when the rights of the pre-emptor were initiated. The determination of that question depended upon whether or not the public surveys had been extended over the land, and whether or not other land had been taken by the claimant under the Mexican grant in satisfaction of it. The Supreme Court held that the patent was a conclusive determination of this question, and could not be collaterally attacked, because the question whether the land had been so freed from the reservation under the Mexican grant as to be open to settlement and pre-emption depended upon matters disclosed by records of proceedings in the land department, and that the department had the jurisdiction to determine those questions.

In *Steel v. Refining Co.*, 106 U. S. 447, 451, Sup. Ct. 389 (an action of ejectment), the plaintiff's title depended upon a patent issued upon a claim for mineral lands within the limits of a townsite; and the defense was that the patent was void because the land was not mineral, and the patentee was not a citizen and had not

declared his intention to become one. The Supreme Court held that proof of these facts was inadmissible to attack the patent, and declared that the land department 'must necessarily consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is unassailable, except by direct proceedings for its annulment or limitation.' To the same effect are *Heath v. Wallace*, 138 U. S. 573, 575, 11 Sup. Ct. 380, and *Barden v. Railroad Co.*, 154 U. S. 288, 14 Sup. Ct. 1030.

" In *French v. Fyan*, 93 U. S. 169, 172, the Supreme Court held that parol evidence was inadmissible to show that land patented to the state of Missouri as swamp and overflow land never was in fact swamp or overflowed land, and that, therefore, the patent was void.

" *Ehrhardt v. Hogaboom*, 115 U. S. 67, 69, 5 Sup. Ct. 1157, that court held that parol evidence was inadmissible to show that land patented to a pre-emptor was swamp or overflowed land, and was therefore included in the grant to the State of California, and that the patent to the pre-emptor was consequently void. The Supreme Court held in these cases that the Acts of Congress devolved upon the land department the duty and conferred upon it the power to determine what lands were of the description granted by the Acts of Congress, and that its decision on that subject was impregnable to collateral attack.

“ These authorities, and those above cited which we have not reviewed, perhaps sufficiently illustrate the distinction between the cases in which the land department has acted upon a subject-matter within and one without its jurisdiction. A careful study and analysis of these decisions will show that none of them are inconsistent with the following rules: (1) A patent or certificate of the land department to land, over which that department has no power of disposition and no jurisdiction to determine the claims of applicants for, under the Acts of Congress, is absolutely void, and conveys no title whatever. Land, the title to which had passed from the government to another party before the claim on which the patent is based was initiated, land reserved from sale and disposition for military and other like purposes, land reserved by a claim under a Mexican or Spanish grant *sub judice*, and land for the disposition of which the Acts of Congress have made no provision, is of this character. *Polk v. Wendal*, 9 Cranch. 87, and cases cited under it, *supra*. (2) A patent or certificate of the land department to land over which that department has the power of disposition and the jurisdiction to determine the claims of applicants for, under the Acts of Congress, is impregnable to collateral attack, whether the decision of the department is right or wrong, and it conveys the legal title to the patentee or to the party named as entitled to that title in the patent or certificate. *Minter v. Crommelin*, 18 How. 87, 89, and cases cited under it, *supra*. (3) A

court of equity may, in a direct proceeding for that purpose, set aside such a patent or certificate, or declare the legal title under it to be held in trust for one who has a better right to it, in cases in which the action of the land department has resulted from fraud, mistake, or erroneous views of the law. *Bogan v. Mortgage Co.*, 11 C. C. A. 128, 63 Fed 192, 195; *Cunningham v. Ashley*, 14 How. 377; *Barnard's Heirs v. Ashley's Heirs*, 18 How. 43; *Garland v. Wynn*, 20 How. 6; *Lytle v. State*, 22 How. 193; *Lindsey v. Hawes*, 2 Black 554, 562; *Johnson v. Towsley*, 13 Wall. 72, 85; *Moore v. Robbins*, 96 U. S. 538; *Bernier v. Bernier*, 147 U. S. 242, 13 Sup. Ct. 244; *Mullen v. U. S.*, 118 U. S. 271, 278, 279, 6 Sup. Ct. 1041; *Moffat v. U. S.*, 112 U. S. 24, 5 Sup. Ct. 10.

“ It is not difficult to determine whether the certificates issued in this case were void or voidable when tested by these rules. Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. The test of jurisdiction is whether the tribunal has power to enter upon the inquiry, not whether its conclusion in the course of it is right or wrong. *Foltz v. Railway Co.*, 8 C. C. A. 635, 60 Fed. 316, 318, and cases cited.

“ When these certificates were issued, the Winona Railroad Company had undoubtedly ap-

plied to the land department for conveyances of the lands in controversy to the state for its benefit. These lands were a part of the public lands of the United States, the disposition of which had been intrusted to that department by the Acts of Congress which establish it and defined the powers and duties of its officers. Moreover, the Acts of Congress under which the Winona Company claimed these lands expressly provided, as we have seen, that the Secretary of the Interior should indicate the lands granted under them in all cases. The conclusion is irresistible that these acts conferred the power and imposed the duty upon the officers of the land department to hear and determine the ultimate question whether or not the railroad company was entitled to these lands under its grants, and to 'indicate' the lands granted by certificates or patents to the state. In no other way could they have discharged the duties these acts imposed upon them. In deciding this question they necessarily considered whether or not the railroad company had so far complied with the acts granting the lands that it had earned them, the character of the lands themselves, and the class to which they belonged, the time of the definite location of the line of the railroad, the homestead entries and pre-emption filings that were then upon the lands, the cancellation of all these entries and filings that had been made, and, finally the legal effect of all these and all other material facts upon the claim of the railroad company to receive the lands under the Acts of Congress. It now appears that they were mis-

taken as to the legal effect of these facts, but the question they decided was one which the Acts of Congress authorized and required them to decide—one which they were obliged to decide before they issued the certificates; and, although their decision and their conveyances evidenced by these certificates may be voidable, they are not absolutely void."

Apply the doctrine of the foregoing case: The Commission to the Five Civilized Tribes had the authority to determine who constituted the final units for the distribution of the public domain of the Creek Nation and had the power under the rules and regulations of the Secretary of the Interior to allot the land. The Commission's jurisdiction was, therefore, complete within the rules announced in the *Winnona* case. The only reasonable contention that the government can make here is that the certificate and patent are voidable by the government. But to avoid the force of the certificate of allotment which passed title to the heirs and to impeach the patent which is a solemn judgment of the Commission and of the Secretary of the Interior, the government must show a mistake of law, which is another way of saying under the pleadings and issues in this case that the government must show that there was no evidence before the Commission upon the question: Was Barney Thlocco alive April 1, 1899?

The case of *French v. Fyan*, 93 U. S. 169, 23 L. ed 812, was an action in which the award of the land department was attacked as void because the department was authorized only to certify swamp lands and had, in fact, in this case, certified as swamp land that which was not in fact swamp lands. The court overruled this contention, saying:

“ *It would be substituting the jury or the court sitting as a jury, for the tribunal which Congress had provided to determine the question, and would be making the patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey.*” (Italics ours.)

In the case of *United States v. Northern Pac. R. Co.*, 37 C. C. A. 290, 95 Fed. 864, the action was to avoid a patent issued to the railroad company by the land department of the government. The court said, in discussing the jurisdiction of the land department:

“ The land department is a *quasi-judicial* tribunal, and a patent is the judgment of that tribunal upon the questions presented, and a conveyance in execution of the judgment. When it is attacked, two questions are presented. They are: Did the department have jurisdiction to issue the patent and to determine the questions which conditioned its issue? and, Was its judg-

ment induced by fraud, mistake of fact, or error in law? The limits of the jurisdiction of this department, and the classes of cases which fall within that jurisdiction, have been considered and stated by this court with some care in *U. S. v. Winona & St. P. R. Co.*, 32 U. S. App. 272, 282-286, 15 C. C. A. 96, 103-107, and 67 Fed. 948, 955-959, to which reference is made for a more extended discussion of this subject. *The rule, broadly stated, is that the land department has jurisdiction over every case in which the control and disposition of the land is intrusted to its care, and that its judgment in such a case, whether right or wrong, conveys the legal title to the patentee, and is valid, unless avoided for error, mistake, or fraud.* The land in dispute in this case, and the tract of land in the place limits of the grant to this company, in lieu of which the patent to this land was issued, were intrusted to this department for disposition, and the power was granted to it, and the duty imposed upon it, to hear and determine the question who was entitled to the conveyance of this land from the government. Its judgment was therefore not without jurisdiction, and its patent conveyed the legal title.

“ The other question is: Was this patent void because the decision upon which it was based was induced by error, fraud, or mistake of fact? A court of equity has the power to set aside such a patent in a case in which the action of the department has resulted from a clear error of law. *Bogan v. Mortgage Co.*, 27 U. S. App. 346,

350, 11 C. C. A. 128, 130, and 63 Fed. 192, 195, and cases there cited. Its decision of a question of fact, however, is conclusive, even in a direct proceeding to set aside the patent, unless it is first made to appear clearly that its adjudication was caused by a plain mistake or was induced by fraud or perjury. There is no general appeal from the officers of the land department to the courts; and the latter cannot review the decisions of questions of fact rendered by those officers in the absence of convincing proof that they were induced by fraud or mistake." (Italics ours.)

In *New Dunderberg Min. Co. v. Old*, 25 C. C. A. 116, 79 Fed. 598, the court defined the test of jurisdiction in the land department as follows:

" The test of jurisdiction is whether or not the tribunal has power to enter upon the inquiry, not whether its conclusion in the course of it is right or wrong."

And again, on the same point:

" Jurisdiction of the subject matter is the power to deal with the general abstract question."

This rule brings us to the one decisive question in the case: Did the Commission to the Five Civilized Tribes have the power to deal with the question of

Barney Thlocco's right to enrollment as a citizen of the Creek Nation, which question involves the inquiry: Was Barney Thlocco alive on April 1, 1899?

The case of *Noble v. Union River Logging R. R. Co.*, 147 U. S. 165, 37 L. ed. 123, contains a most comprehensive discussion of jurisdiction. This was a bill in equity by the railroad company to enjoin the Secretary of the Interior from executing a proposed order revoking the approval of the plaintiff's maps for a right of way over the public lands. *The defense alleged was that the Department was without jurisdiction to award the right of way to the railroad for the reason that the road was not a common carrier as required by the act authorizing the Secretary to award the right of way and that the existence of the railroad as a common carrier was a jurisdictional fact without which the Secretary had no power to act. In short it was contended that the award could only be made to a common carrier and that the railroad had no existence as a common carrier. That is to say it was contended that the railroad was a fictitious person or a myth so far as the right to receive the right of way, was concerned. The court held otherwise, saying:*

“ The position of the defendants in this connection is, that the existence of a railroad, with the duties and liabilities of a common carrier of

freight and passengers, was a jurisdictional fact, without which the secretary had no power to act, and that in this case he was imposed upon by the fraudulent representations of the plaintiff, and that it was competent for his successor to revoke the approval thus obtained; in other words, that the proceedings were a nullity, and that his want of jurisdiction to approve the map may be set up as a defense to this suit.

“ It is true that in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; such, for example, as the service of process within the state upon the defendant in a common law action. (*D'Arcy v. Ketchum*, 52 U. S. 11 How. 165 (13:548); *Webster v. Reid*, 52 U. S. 11 How. 437 (13:761); *Harris v. Harde-man*, 55 U. S. 14 How. 334 (14:444); *Pennoyer v. Neff*, 95 U. S. 714 (24:565); *Borden v. Fitch*, 15 Johns 141); the seizure and possession of the *res* within the bailiwick in a proceeding *in rem* (*Rose v. Himely*, 8 U. S. 4 Cranch. 241 (2:608); *Thompson v. Whitman*, 85 U. S. 18 Wall. 457 (21:897), a publication in strict accordance with the statute, where the property of an absent defendant is sought to be charged. *Galvin v. Page*, 85 U. S. 18 Wall. 350 (21:959); *Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137 (35:116). So, if the court appoint an administrator of the estate of a living person, or, in a case where there is an executor ca-

pable of acting (*Griffith v. Frazier*, 12 U. S. 8 Cranch. 9 (3:471), or condemns as lawful prize a vessel that was never captured (*Rose v. Himely*, 8 U. S. 4 Cranch. 241, 269 (2:608, 617); or a court martial proceeds and sentences a person not in the military or naval service (*Wise v. Withers*, 7 U. S. 3 Cranch. 331 (2:457); or the Land Department issues a patent for land which has already been reserved or granted to another person, the act is not voidable merely, but void. In these and similar cases the action of the court or officer fails for want of jurisdiction over the person or subject matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding.

“ There is, however, another class of facts which are termed quasi-jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally. With respect to these facts, the finding of the court is as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties. Examples of these are the allegations and proof of the requisite diversity of citizenship, or the amount in controversy in a Federal Court, which, when found by such court, cannot be questioned collaterally. (*Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, 123 U. S. 552 (31:202); *Re Sawyer*, 124 U. S. 200, 220 (30:402, 409); the existence and amount of the debt of a

petitioning debtor in an involuntary bankruptcy (*Michaels v. Post*, 88 U. S. 21 Wall. 398 (22:-520); *Betts v. Bagley*, 12 Pick. 572); the fact that there is insufficient personal property to pay the debts of a decedent, when application is made to sell his real estate (*Comstock v. Crawford*, 70 U. S. 3 Wall. 396 (18:34); *Grignon v. Astor*, 43 U. S. 2 How. 319 (11:283); *Florentine v. Barton*, 69 U. S. 2 Wall. 210 (17:783); the fact that one of the heirs of an estate had reached his majority, when the act provided that the estate should not be sold if all the heirs were minors (*Thompson v. Tolmie*, 27 U. S. 2 Pet. 157 (7:-381); and others of a kindred nature, where the want of jurisdiction does not go to the subject-matter or the parties, *but to a preliminary fact necessary to be proven to authorize the court to act*. Other cases of this description are *Hudson v. Guestier*, 10 U. S. 6 Cranch. 281 (3:224); *Ex parte Watkins*, 28 U. S. 3 Pet. 193 (7:650); *United States v. Arredondo*, 31 U. S. 6 Pet. 691, 709 (8:547, 554); *Dyckman v. New York*, 5 N. Y. 434; *Jackson v. Crawford*, 12 Wend. 533; *Jackson v. Robinson*, 4 Wend. 436; *Fisher v. Bassett*, 9 Leigh, 119, 131; *Wright v. Douglas*, 10 Barb. 97, 111. In this class of cases, if the allegation be properly made, and the jurisdiction be found by the court, such finding is conclusive and binding in every collateral proceeding. And even if the court be imposed upon, by false testimony, its finding can only be impeached in a proceeding instituted directly for that purpose. *Simms v. Slacum*, 7 U. S. 3 Cranch, 300 (2:446). (Italics ours.)

“ This distinction has been taken in a large number of cases in this court, in which the validity of land patents has been attacked collaterally, and it has always been held that the existence of lands subject to be patented was the only necessary prerequisite to a valid patent. In the one class of cases, it is held that if the land attempted to be patented had been reserved, or was at the time no part of the public domain, the Land Department had no jurisdiction over it and no power or authority to dispose of it. In such cases its action in certifying the lands under a railroad grant, or in issuing a patent, is not merely irregular, but absolutely void, and may be shown to be so in any collateral proceeding. *Polk v. Wendal*, 13 U. S. 9 Cranch. 87 (3:665); *Patterson v. Winn*, 24 U. S. 11 Wheat. 380 (6:500); *Jackson v. Lawton*, 10 Johns. 23; *Minter v. Crommelin*, 59 U. S. 18 How. 87 (15:279); *Reichert v. Felps*, 73 U. S. 6 Wall. 160 (18:849); *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629 (28:1122); *United States v. Southern Pac. R. Co.*, 146 U. S. 615 (36:1104).

“ Upon the other hand, if the patent be for lands which the Land Department had authority to convey but it was imposed upon, or was induced by false representations to issue a patent, the finding of the department upon such facts cannot be collaterally impeached, and the patent can only be avoided by proceedings taken for that purpose. As was said in *St. Louis Smelt. & Ref. Co. v. Kemp*, 104 U. S. 636, 640 (27:875, 876); ‘In that respect they’ (the offi-

ers of the Land Department) 'exercise a judicial function, and, therefore, it has been held in various instances by this court, that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment.' In *French v. Fyan*, 93 U. S. 169 (23:812) it was held that the action of the Secretary of the Interior in identifying swamp lands, making lists thereof, and issuing patents therefor, could not be impeached in an action at law by showing that the lands which the patent conveyed were not in fact swamp and overflowed lands, although his jurisdiction extended only to lands of that class. Other illustrations of this principle are found in *Johnson v. Towsley*, 80 U. S. 13 Wall. 72 (20:85); *Moore v. Robbins*, 96 U. S. 530 (24:848); *Steel v. St. Louis Smelt. & Ref. Co.*, 106 U. S. 47 (27:226); *Quinby v. Conlan*, 104 U. S. 420 (26:800); *Vance v. Burbank*, 101 U. S. 514 (25:929); *Hoofnagle v. Anderson*, 20 U. S. 7 Wheat. 212 (5:437); *Ehrhardt v. Hogaboom*, 15 U. S. 67 (29:346). In *Moore v. Robbins*, 96 U. S. 530 (24:848), it was said directly that it is a part of the daily business of officers of the Land Department to decide when a party has by purchase, by pre-emption or by any other recognized mode, established a right to receive from the government a title to any part of the

public domain. This decision is subject to an appeal to the Secretary of the Interior if taken in time; 'but if no such appeal be taken, and the patent issued under the seal of the United States, and signed by the President, is delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all authority of control of the Executive Department over the land and over the title which it has conveyed * * *. The functions of that department necessarily cease when the title has passed from the government.'

“ We think the case under consideration falls within this latter class. The lands over which the right of way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and when decided and his approval was noted upon the plats, the first section of the act vested the right of way in the railroad company. The language of that section is 'that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory,' etc. The uniform rule of this court has been that such an act was a grant *in praesenti* of lands to be thereafter identified. *Denver & R. G. R. Co. v. Alling*, 99 U. S. 463 (25:438). The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken di-

rectly for that purpose. If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained. *Moffat v. United States*, 112 U. S. 24 (28:623); *United States v. Minor*, 114 U. S. 233 (29:110). A revocation of the approval of the Secretary of the Interior, however, by his successor in office was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void. As was said by Mr. Justice GRIER, in *United States v. Stone*, 69 U. S. 2 Wall. 525, 535 (17:765, 767): 'One officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of the court.' *Moore v. Robbins*, 96 U. S. 530 (24:848). The case of *United States v. Schurz*, 102 U. S. 378 (26:167) is full authority for the position assumed by the plaintiff in the case at bar. In this case the relator had been adjudged to be entitled to 160 acres of the public lands, the patent had been regularly signed, sealed, countersigned and recorded; and it was held that a mandamus to the Secretary of the Interior to deliver the patent to the relator should be granted. It was said in this case by Mr. Justice MILLER: 'Whenever this takes place' (that is, when a patent is duly executed) 'the land has ceased to be the land of the government, or, to speak in technical language, title has passed from the government, and the power of these officers to deal with it has also passed away.'

“ It was not competent for the Secretary of the Interior thus to revoke the action of his predecessor, and the decree of the court below must, therefore, be affirmed.”

In the case of *United States v. Schurz*, 12 Otto. 378, 26 L. ed. 173, the court in distinguishing between a void and voidable patent said :

“ If a patent should issue for land in the State of Massachusetts, where the government never had land, it would be absolutely void. If it should issue for land once owned by the government, but long before sold and conveyed by patent to another who held possession, it might be held void in a court of law on the production of the senior patent. But such is not the case before us. Here the question is whether this land had been withdrawn from the control of the land department by certain acts of other persons, which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may be voidable, but not absolutely void.”

In *St. Louis Smelting & Refining Co. v. Kemp*, 14 Otto. 636, 26 L. ed. 875, in discussing this question, it was said :

“ The general doctrine declared may be stated in a different form, thus : a patent, in a court

of law, is conclusive as to all matters properly determinable by the land department, when its action is within the scope of its authority; that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances existed. Thus, in *Minter v. Crommelin*, reported in 18th Howard, 87 (59 U. S. XV, 279), where it appeared that an Act of Congress of 1815 had provided that no land reserved to a Creek warrior should be offered for sale by an officer of the land department unless specifically directed by the Secretary of the Treasury, and declared that if the Indian abandoned the reserved land it should become forfeited to the United States, a patent was issued for the land, which did not show that the Secretary had ordered it to be sold, and the court said: 'The rule being that the patent is evidence that all previous steps had been regularly taken to justify making a patent, and one of the necessary steps here being an order from the Secretary to the register to offer the land for sale because the warrior had abandoned it, we are bound to presume that the order was given. That such is the effect, as evidence, of the patent produced by the plaintiffs was adjudged in the case of *Bagnell v. Broderick*, 13 Pet. 448, and is not open to controversy anywhere, and the state court was mistaken in holding otherwise.'

“ On the other hand, a patent may be collaterally impeached, in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands, that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars, the judgment of the department, upon matters properly before it, is not assailed nor is the regularity of its proceedings called into question, but its authority to act at all is denied and shown never to have existed.

“ According to the doctrine thus expressed and the cases cited in its support, and there are none in conflict with it, there can be no doubt that the court below erred in admitting the record of the proceedings upon which the patent was issued, in order to impeach its validity. The judgment of the department upon their sufficiency was not, as already stated, open to contestation. If in issuing a patent its officers took mistaken views of law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities, as will con-

trol the legal title in the patentee's hands. *Boggs v. Merced Mining Co.*, 14 Cal. 279, 363. It does not lie in the mouth of a stranger to the title, to complain of the act of the government with respect to it. If the government is dissatisfied it can, on its own account, authorize proceedings to vacate the patent or limit its operation. * * *.

“ The case at bar, then, is reduced to the question whether the patent to Starr is void on its face; that is, whether, read in the light of existing law, it is seen to be invalid. It does not come within any of the exceptions mentioned in the cases cited. The lands it purports to convey are mineral, and were a part of the public domain. The law of Congress had provided for their sale. The proper officers of the land department supervised the proceedings. It bears the signature of the President, or rather of the officer authorized by law to place the President's signature to it, which is the same thing; it is properly countersigned, and the seal of the general land office is attached to it.”

The authorities cited by the government on the question of jurisdiction examined. The finding by the Commission that a dead man was alive is not analogous to an adjudication in an administration matter that a living man is dead.

In *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, a judgment of a probate court holding that a live man was dead is held to be void upon the ground that to

sustain such judgment *would deprive him of his property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.* While all the courts holding such an adjudication void appear to place it upon the constitutional question in the arguments, reference is made to the fact that the very presence of the living man is a *demonstration* of the mistake, and that the judgment, if permitted to stand, would be a *shocking injustice.* But the ground of the decision in each case is that such judgment was rendered without notice to the living man, and to sustain it would take from him his property without due process of law. *Neither the Creek Nation nor the government can invoke any of these grounds.* The government cannot be heard to say there was no notice when it appeared by its officers; the Creek Nation appeared by its attorney; the Creek Nation further appeared by the Creek Commission and its head men. Nor can it be said that the government may now *demonstrate* that there was a mistake. At the most if the question were retried there would be but a conflict of evidence. Nor can it be claimed that any shocking injustice will result from the Commission's judgment. It must be admitted that the *Commission, unlike the probate court, had the power to adjudge a member of the tribe who was living on April 1, 1899, as dead,* else the entire question of enrollment is still open.

The Commission was constituted, among other things, to find, determine and *adjudge the date of the death, whether is was before or after April 1, 1899.* The power to judge always carries with it the power to misjudge the evidence and therefore to make a mistake.

Iowa Land and Trust Company v. United States,
Known as the Hawkins case.

The case of *Iowa Land & Trust Company v. United States*, 217 Fed. 11, known as the *Hawkins* case, is unsound, as suggested by Judge Hook in a dissenting opinion, insofar as it holds the enrollment and allotment there involved absolutely void. *It is sound in holding that as between the government and the heirs of Chester Hawkins, the allottee, the enrollment and allotment were voidable in a direct proceeding brought for that purpose.* Chester Hawkins died before April 1, 1899. His heirs, *by fraud and perjury, induced the Commission to enroll Chester Hawkins upon their false representations that he was alive April 1, 1899.* The bill was upon the theory that the enrollment and allotment might be impeached for fraud of the beneficiaries, *and when so impeached that the court might retry the question, Was Chester Hawkins alive April 1, 1899?* and that was the order of the trial. The evidence showed con-

vincingly that the heirs by their perjured testimony procured the enrollment. That left a situation in which the government was permitted to retry the question, Was Chester Hawkins alive April 1, 1899, and the evidence showed conclusively that he was dead prior to that date. *But Hawkins was regarded as alive in contemplation of law until the judgment of the Dawes Commission was impeached for fraud. In that case it would have been held that Hawkins was alive April 1, 1899, in contemplation of law for the purposes of that action if the judgment of the Commission had not been impeached for fraud.* So here, Barney Thlocco must be considered as alive in contemplation of law until the judgment of the Commission is impeached for mistake of law, that being the ground upon which this action was commenced. As between the government, which was imposed upon by the heirs, on the one hand, and the heirs on the other, the Circuit Court of Appeals for the Eighth Circuit considered the enrollment and allotment as a nullity and that the allottee was for the purposes of that action as between the government and the heirs a fictitious person. This much of the opinion is sound and in accord with authority. But the further holding that the allotment was absolutely void by which an innocent purchaser's title was stricken down, is not only against the authorities but, we respectfully submit, is unreasonable, and is at war with

the theory upon which the government prevailed. The opinion by the Court of Appeals taken as a whole, shows that the impeachment of the judgment of the Dawes Commission was regarded as a necessary prerequisite to the retrial of the question, was Chester Hawkins alive April 1, 1899, which shows that the court did not treat the enrollment and allotment as an absolute nullity but as voidable merely. In *Folk v. United States*, 233 Fed. 177, Judge SANBORN, in an exhaustive and learned opinion, shows that even if an allottee was in fact dead before April 1, 1899, the judgment of the Commission *is voidable only* and subject only to direct attack, *and that in contemplation of law such allottee must be regarded as alive until the judgment of the Commission is impeached in a direct proceeding for that purpose, and that an innocent purchaser will be protected who has relied upon the public records made by the government of the United States.* Moreover, the opinion of the two judges in the *Hawkins* case shows, we respectfully submit, a misunderstanding of the allotment scheme in the Indian Territory. Under Proposition III of this brief we set forth in great detail the history of this general allotment scheme, and show that the allotment scheme was in the nature of a partition; that the patents are not like the ordinary patents from the government; that the allottees did not take their titles by grant, as in public land cases,

but by partition or allotment. We show elsewhere in this brief how it will be utterly impossible for lawyers to pass land titles in that part of Oklahoma formerly the Indian Territory if it is held that the enrollment and allotment of a citizen in fact dead April 1, 1899, is to be regarded as an absolute nullity. Such a holding by this court would produce an intolerable situation.

Counsel for the government cite cases holding personal judgments void where no service was had and there was no appearance by the defendant. But the enrollment and allotment of Thlocco was not in the nature of a personal judgment but more in the nature of an action *in rem*. The Commission was dealing with the tribal property for the purposes of partition. The first step in the partition scheme was to establish the *status* of enrolled members of the tribe and of all applicants for citizenship. No question of want of notice arises here because the government and the Creek Nation were present, acting and participating through their agents, attorneys and representatives.

Counsel for the government also cite cases where judgments have been held void for want of jurisdiction of the subject matter. But certainly the Commission had jurisdiction of the subject mat-

n this case, having been constituted to hear the
ence, weigh it, and determine whether or not
occo and those similarly situated were entitled to
me units for the final partition of the tribal
erties. The Commission was directed by Con-
s after having determined the *status* of all those
ne tribal rolls or who might apply for enrollment
lot the land. Full and complete jurisdiction was
erred upon the Commission.

There are many analogies in the law to the
tion under consideration. We think a natural-
on judgment is of a closely kindred character.

As early as 4th Peters, in the case of *Spratt v.*
att, p. 407, Chief Justice MARSHALL said:

“ The various acts upon the subject submit
the decision on the right of aliens to admission
as citizens to courts of record. They are to re-
ceive testimony, to compare it with the law, and
judge on both law and fact. The judgment is
entered on record as the judgment of the court.
It seems to us, if it be in legal form, to close all
inquiry, and, like every other judgment, to be
complete evidence of its own validity.”

So, in *State v. Hoeflinger*, 35 Wisconsin, 400, the
ned judge said:

“ This record of the court of plaintiff’s nat-
uralization was conclusive upon this question

in this collateral proceeding. It was the record of a judgment and imports absolute verity."

The same doctrine was announced in *McCarthy v. Marsh*, 5 N. Y. 263.

C

The authority and jurisdiction of the Commission has been defined in the following cases:

Kimberlin v. Commission to the Five Civilized Tribes, 44 C. C. A. 109, 104 Fed. 653;

Wallace v. Adams, 74 C. C. A. 540;

Wallace v. Adams, 204 U. S. 415, 51 L. ed. 547;

Uinta Tunnel Co. v. Creede, 57 C. C. A. 200, 119 Fed. 164;

Neff v. United States, 91 C. C. A. 241, 165 Fed. 273;

Johnson v. Drew, 171 U. S. 93, 43 L. ed. 88;

Nunn v. Hazelrigg, 132 C. C. A. 474, 216 Fed. 330;

Malone v. Alderdice, 129 C. C. A. 204, 212 Fed. 668;

Folk v. United States, 233 Fed. 177.

The case of *Kimberlin v. The Commission to the Five Civilized Tribes*, *supra*, is a leading authority upon all questions which involve the powers or juris-

tion of the Commission to the Five Civilized Tribes. After reviewing various Acts of Congress conferring jurisdiction upon the Commission, this court said:

“ Conceding, however, but not deciding, that the application of the plaintiff in error was in time to entitle her to a hearing and decision, that the facts which she alleged were admitted, and that it was the duty of the commission to hear and decide the question of her right to citizenship according to the law and the very right of the matter, the power and duty of the courts below and of this court are no less certain. It is conceded that the commissioners are executive officers. It is not their sole or chief function to hear and determine controversies between contending parties. *Nevertheless, in the determination of the citizenship* of the parties who apply to them for membership in the Five Nations, they are vested with *judicial powers* by the Acts of Congress. They have authority to compel the attendance of witnesses, to send for persons and papers, to hear evidence, ‘to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship,’ and above all they are empowered ‘*to hear and determine the application of all persons who apply to them for citizenship.*’ This grant of power is plenary. It vests the authority and imposes the duty upon this commission to hear and to decide every question of law and of fact which is material to

the right of the applicant to enrollment as the citizen of a nation. Take the case at bar. The facts are conceded. But do these facts entitle the applicant to be enrolled as a citizen of the Chickasaw Nation? Does the provision of article 38 of the treaty of 1866, that 'every white person who, having married a Choctaw or Chickasaw, resides in said Choctaw or Chickasaw Nations * * * is to be deemed a member of said Nation,' apply to those who, like the plaintiff, were married subsequent to the adoption of the treaty? Are the amendments of the laws of the Chickasaw Nation made by its legislature in 1887 and in 1890, which by their terms prohibit the plaintiff from acquiring any rights of citizenship in that nation by her inter-marriage with the white widower of a deceased Indian woman, void, in the face of the treaty, or are they consistent with its provisions and with the Acts of Congress, and fatal to the claim of the plaintiff in error? The consideration and decision of these questions were indispensable to the determination of the plaintiff in error's right to the citizenship she sought, and the Acts of Congress intrusted *their consideration* and decision to the judgment and discretion of the Commission, and not to those of the courts. Under these Acts of Congress the Commission to the Five Civilized Tribes is a special tribunal, vested with judicial power to hear and determine the claims of all applicants to citizenship in the Five Tribes, and its enrollment or refuse to enroll the applicant in each partic-

ular case constitutes its judgment in that cause. In the case before us this tribunal has heard and determined the claim of the plaintiff. Whether its decision was right or wrong is immaterial in this court, and that question will not be considered. Congress saw fit to intrust to the *judicial discretion* of the Commission the determination of the application of the plaintiff in error, and of every question of law and of fact which that decision involved."

The case of United States against the heirs of Barney Thlocco must be determined in favor of the heirs upon the rules announced in the *Kimberlin* case where it was said: that in the determination of the citizenship in the tribe the Commissioners were vested with judicial powers by Acts of Congress; that the Commission had plenary power; that Congress had vested in the Commission and had imposed on the Commission the duty *to hear and determine and decide every question of law and of fact material to the right of enrollment*; that the enrollment by the Commission or the refusal to enroll in each particular case constitutes the Commission's judgment in that cause; that whether the decision of the Commission was right or wrong is immaterial to the court and that question cannot be considered. The enrollment of Barney Thlocco was, therefore, the solemn judgment of the Commission and this judgment was

rendered as we shall show more fully elsewhere, upon inquiry into the question, Was Barney Thlocco alive April 1, 1899, and upon substantial evidence which satisfied the Commission that Thlocco was alive April 1, 1899, and entitled to enrollment. The character of the Commission's judgment as defined in the *Kimberlin* case brings the government to its one insuperable difficulty. The complainant alleges and attempted to prove, in order to impeach the judgment of the Commission, that they acted arbitrarily and without evidence and without any belief on the question as to whether or not Barney Thlocco was alive on April 1, 1899, and therefore entitled to enrollment. But since all the Government's proof shows affirmatively that this Indian was enrolled in regular manner according to the ordinary and approved procedure in such cases, and upon evidence, the Government undertakes to escape from its own theory by taking the position that, regardless of the manner in which the Indian was enrolled, his enrollment was a nullity if in fact he died before April 1, 1899. The Government's new position, inconsistent with the bill, is another way of stating the erroneous view that a wrong conclusion reached by the Commission in the ordinary course of the exercise of its power, is void.

In *Neff v. United States*, 91 C. C. A. 241, 165 Fed. 273, the doctrine of the *Kimberlin* case is again announced.

In *Johnson v. Drew*, 171 U. S. 93, 43 L. ed. 88, in discussing the jurisdiction of the Land Department of the Government, the court said:

“ It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final. Whether for instance a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact, not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to those questions, is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined.”

In *Nunn v. Hazelrigg*, 132 C. C. A. 474, 216 Fed. 330, the case of *Kimberlin v. Commission to the Five Civilized Tribes*, is approved as follows:

“ The Dawes Commission thus created and existing was a *quasi-judicial* body. *Kimberlin v. Commission to Five Civilized Tribes*, 104 Fed. 653, 44 C. C. A. 109. It was expressly required to make separate rolls of the Indians and freed-

men. To be enrolled as a Creek Indian, it was not sufficient for an applicant to show that he was an Indian, but he must show, and the Commission must find, that he was an Indian of the Creek Tribe; and to be enrolled as a freedman it was not sufficient to show that he was an African, but he must show, and the Commission must find, that he was a former slave or the descendant of a former slave of some member of the Creek Tribe, or at least a slave of some other person adopted by the Creek Nation. It was therefore necessary for an applicant for enrollment to show upon what grounds he was entitled to such enrollment; that he was of Creek Indian blood; that he was a Creek Freedman, became a citizen of the tribe by the treaty of June 14, 1866; or that he had without any such rights become a member of the tribe by adoption. And, when the Commission found by any one of these methods, a person was entitled to enrollment, the manner in which he was found to be entitled to such enrollment was adjudicated as much as the mere fact of the right of enrollment."

In the *Nunn-Hazelrigg* case, an effort was made to impeach the finding of the Commission as to the blood of a Creek citizen. The Commission was authorized to make rolls by blood—an Indian roll and a Freedman roll. Would the Government contend that where the Commission has heard and passed upon the question whether an applicant was an Indian or Freedman, and has determined that question on

evidence, and has made a finding, that the finding is void if wrong? In the Choctaw and Chickasaw Nations Freedmen citizens of the tribe received in the final distribution of the lands only a very small share as compared with Indian citizens. Could the government now be heard to assert that certain Indian citizens of those tribes are in fact freedmen and that they therefore received too much of the public domain of the tribe? We put the question: *Did the Commission have the jurisdiction to enroll a freedman as an Indian? The Commission could no more make a negro an Indian than it could make a dead man alive, but the Commission did have complete authority to determine whether the applicant was a freedman or an Indian and the finding when properly made in the ordinary course of the Commission's administration is entirely conclusive in the courts.* In a proper case perhaps the government might impeach the finding of the Commission that an applicant is an Indian and have the court adjudge such applicant a freedman, but this could be done upon one of the well recognized grounds for attacking the finding of the Land Department. Certainly the finding by the Commission that a freedman is an Indian is not void.

In *Malone v. Alderdice*, 129 C. C. A. 204, 212 Fed. 669, this court again affirmed the doctrine of the

Kimberlin case saying: "The Commission to the Five Civilized Tribes which made the enrollment of their citizens and freedmen, was a *quasi*-judicial tribunal, empowered to determine who should be enrolled and what lands should be allotted and in what way it should be allotted to every citizen and freedman and its adjudication of these questions and of every issue of law and fact that it was necessary for it to determine in order to decide these questions, is conclusive and impervious to collateral attack."

There was only one possible method of attack upon the issues framed in this case, namely, the government might have shown, had it been able to do so, that there was no evidence before the Commission to sustain its finding and upon such a showing a decree should have been for the complainant, but not otherwise.

The recent case of *Folk v. United States*, 233 Fed. 177, by the Circuit Court of Appeals for the Eighth Circuit, is squarely in point, and supports the defendants in all respects. This is known as the *Atkins* case. The United States commenced the action on the theory that Thomas Atkins, the allottee, died before April 1, 1899. As to the power and jurisdiction of the Commission to the Five Civilized Tribes, the court said:

“ These defendants were, and for many months had been, in the exclusive possession of the land which is the subject of this controversy, exploring it for oil and gas and extracting oil from it under patents and a title fair on their face and adjudged valid, so far as the defect asserted in this case is concerned, the right of Thomas Atkins to enrollment as a Creek citizen by the Dawes Commission, a *quasi*-judicial tribunal, to which, by the Creek Agreement, the Congress and the Creek Tribe intrusted the power and upon which it imposed the duty to decide that question, a tribunal whose jurisdiction of that question and of every other issue it was necessary for it to consider and determine in reaching its decision was conclusive upon all and impervious to collateral attack, either by the Creek Nation, the United States, or any other party in interest. *Kimberlin v. Commission of Five Civilized Tribes*, 104 Fed. 653, 662, 44 C. C. A. 109, 118; *Malone v. Alderdice*, 212 Fed. 668, 670, 129 C. C. A. 204, 206. To avoid this incontrovertible rule the Creek Tribe and the United States, for the sole benefit of the Creek Tribe, make this direct attack upon the decision and judgment of the Dawes Commission that Thomas Atkins was entitled to enrollment as a member of the Creek Tribe and upon the patents based on that adjudication by a complaint in equity to avoid and set them all aside on the ground that there was no information or evidence before the Commission to sustain its adjudication.

“ The claim of the Creek Tribe, the only party plaintiff that has any pecuniary interest in this litigation, is conditioned by the existence of its alleged right to avoid that adjudication and the patents founded on it on the ground that there was no evidence of the qualifications of Thomas Atkins for enrollment before the Commission which adjudged him entitled thereto and no evidence before it that he was living on April 1, 1899. That adjudication, the allotment of this land to Thomas Atkins, and the patents to him were all public records open to the inspection of the Creek Nation from 1903 until the present time, but no attack upon their justice or verity was ever made until this suit was filed in 1915, more than 11 years after the completion of the adjudication, the patents, and the public record thereof.”

The decisions of the Supreme Court of Oklahoma are to the same effect.

D

The government pleaded and attempted to prove only a mistake of law.

—*Howe v. Parker*, (C. C. A.) 190 Fed. 738;

Harnage v. Martin, 40 Okla. 341, 136 Pac. 154;

James v. Germania Iron Co., 46 C. C. A. 476, 107 Fed. 597;

Folk v. United States, 233 Fed. 177.

An error of law or a mistake of law is a judgment rendered or a finding made without any evidence in support thereof. A mistake of fact by the land department or the Commission is a misapprehension of the *facts proved*. Where complainant relies upon a mistake of law as ground for recovery, it is necessary to show that there was no evidence to support the finding, and it is necessary to prove and plead the evidence that was before the Commission so that the court may determine first of all, before a re-examination of the facts tried by the Commission, whether there was any evidence to sustain the finding. Where a complainant relies upon error of law he comes saying there was no evidence and this allegation presents the one issue to be inquired into in order to impeach the finding. On the other hand where a mistake of fact is pleaded as a ground for recovery, the complainant comes saying there was evidence before the land department or the Commission and there was a gross misapprehension of the facts proved. This class of cases is well illustrated by such errors as mistake as to the township or range number in which a tract of land is located; a mistake as to the lot or block number of a town lot; the award to A by inadvertence where the evidence shows that B is entitled to receive the award. Where a complainant's bill is framed on the theory that the evidence before the department was insuffi-

cient to support the finding, then there is presented the issue: Was there a mistake of law? However, if the government relied in this case upon a mistake of fact the situation of the complainant would not be improved because in such case the complainant must plead and prove all the evidence that was before the department in order that the court may determine whether or not there was a gross misapprehension of the facts proved.

In *Howe v. Parker, supra*, the Circuit Court of Appeals for the Eighth Circuit clearly defines error of law and mistake of fact using the following language in the second syllabus:

“ Whether or not there is any evidence to sustain a charge, a claim, or a finding of fact in a controversy before the Land Department over the title to the public land is a question of law, and an error in the decision of that question which results in the issue of a patent to the wrong party is remediable in equity.”

And in the body of the opinion:

“ Whether or not the weight of evidence in substantial conflict sustains the one or the other side of an issue of fact is a question upon which, in cases within his jurisdiction, the final decision of the Secretary of the Interior is conclusive in the absence of fraud or gross mistake. But

whether or not there is at the close of a final trial or hearing before him any evidence to sustain a charge or a finding of fact in support of it is in his and in every judicial and quasi-judicial tribunal a question of law. *Ward v. Joslin*, 186 U. S. 142, 147, 22 Sup. Ct. 807, 46 L. ed. 1093; *United States Fidelity & G. Co. v. Board of Com'rs*, 145 Fed. 144, 151, 76 C. C. A. 114, 121; *Laing v. Rigney*, 160 U. S. 531, 540, 16 Sup. Ct. 366, 40 L. ed. 525; *Southern Pacific Company v. Pool*, 160 U. S. 438, 440, 16 Sup. Ct. 338, 40 L. ed. 485; *The Francis Wright*, 105 U. S. 381, 387, 26 L. ed. 1100; *Clement v. Insurance Co.*, 7 Blatchf. 51, 53, 54, 58, Fed. Cas. No. 2882; *Delaware, Lackawanna & Western R. Co. v. Converse*, 139 U. S. 469, 472, 11 Sup. Ct. 569, 35 L. ed. 213. And an injurious error of the Secretary in finally deciding that question presents good ground for relief in equity. The Land Department of the United States is a quasi-judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, and its decisions of the issues presented at such hearings are impervious to collateral attack. But its judgments and patents do not conclude the rights of claimants to the land. They rest on established principles of law and fixed rules of procedure the application of which to each case conditions its right decision, and if the officers of the Land Department are induced to issue a patent to the wrong party by an erroneous view of the law or by a gross mistake of the *facts proved*, or by a decision in-

duced by fraud, the rightful claimant is not remediless. He may in a court of equity avoid the effect of the decision and the patent and charge the legal title derived from it with a trust in his favor. *Lytle v. State of Arkansas*, 22 How. 193, 203, 16 L. ed. 306; *Smelting Co. v. Kemp*, 104 U. S. 636, 647, 26 L. ed. 875; *Moore v. Robbins*, 96 U. S. 530, 536, 538, 24 L. ed. 848; *Bogan v. Edinburg American Land M. Co.*, 63 Fed. 192, 195, 11 C. C. A. 128, 130; *United States v. Winona & St. Peter R. Co.*, 67 Fed. 948, 958, 15 C. C. A. 96, 106; *U. S. v. Northern Pac. R. Co.*, 95 Fed. 864, 870, 37 C. C. A. 290, 296; *Cunningham v. Ashley*, 14 How. 377, 14 L. ed. 462; *Barnard's Heirs v. Ashley's Heirs*, 18 How. 43, 15 L. ed. 285; *Garland v. Wynn*, 20 How. 6, 15 L. ed. 801; *Johnson v. Towsley*, 13 Wall. 72, 85, 20 L. ed. 485; *Bernier v. Bernier*, 147 U. S. 242, 13 Sup. Ct. 244, 37 L. ed. 152.

“ A complete copy of all the evidence before the Secretary at the final hearing is made a part of the bill in hand, and the first question to be considered is, was there *any* evidence that Henry Howe violated the Acts of Congress of 1889 and disqualified himself as a homesteader?”

In *Harnage v. Martin*, 40 Okla. 341, 136 Pac. 155, the Supreme Court of Oklahoma followed *Howe v. Parker*, *supra*, in defining an error of law, using the following language :

“ In *Howe v. Parker*, *supra*, Judge SANBORN, who delivered the opinion for the court said:

‘Whether or not the weight of evidence in substantial conflict sustains the one or the other side of an issue of fact is a question upon which, in cases within his jurisdiction, the final decision of the Secretary of the Interior is conclusive in the absence of fraud or gross mistake. But whether or not there is at the close of a final trial or hearing before him any evidence to sustain a charge or a finding of fact in support of it is in his and in every judicial and *quasi*-judicial tribunal a question of law.’ In support of this statement of the law numerous authorities are cited. If the Secretary of the Interior in rendering his decision assumed a fact established which was necessary to the rights of the prevailing party, but which there was wanting any evidence to support, the error committed by him was one of law, and plaintiff may have it reviewed by a court of equity in a proceeding brought to avoid the effect of the decision of the Secretary of the Interior.”

To allege that there was evidence before the Land Department but that there was no evidence to support the finding made by the department is precisely the same as to say that there was no evidence heard at all. This brings us therefore to the test laid down in *Howe v. Parker, supra*, Was there any evidence to support the finding of the Commission?

E.

If the finding of the Commission was based upon any evidence, the action of the Commission enrolling Thlocco is conclusive. The courts cannot inquire into the extent of investigation made by the Commission. The enrollment of Thlocco is a determination or judgment not only that he had the right to be enrolled, but that he was enrolled in the manner required by law. The trial court held properly that the government must prove first of all that there was no evidence before the Commission before a retrial of the issue passed upon by the Commission. The findings of fact by trial court are against the government.

- Paine v. Foster*, 9 Okla. 213, 53 Pac. 109;
Hartwell v. Havighorst, 11 Okla. 189, 66
Pac. 337;
Same, 196 U. S. 635, 49 L. ed. 629;
Howe v. Parker, 111 C. C. A. 466, 190 Fed.
739;
Sanford v. Sanford, 139 U. S. 642, 35 L. ed.
290;
Harnage v. Martin, 40 Okla. 341, 136 Pac.
154;
DeCambra v. Rogers, 189 U. S. 119, 47 L.
ed. 734;
M'Goldrick Lbr. Co. v. Kinsolving, 137 C.
C. A. 377, 221 Fed. 819;

James v. Germania Iron Co., 46 C. C. A. 476,
107 Fed. 597;

U. S. v. Atherton, 102 U. S. 372, 26 L. ed.
213;

Kimberlin v. Commission, 44 C. C. A. 109,
104 Fed. 653;

U. S. v. Northern Pac. R. Co., 37 C. C. A.
290, 95 Fed. 864;

Durango Land Co. v. Evans, 25 C. C. A. 523,
80 Fed. 425;

Goings v. Chapman, 18 Ind. 194;

Nordyke v. Shearon, 12 Ind. 346;

Colo. Coal Co. v. U. S., 123 U. S. 307, 31 L.
ed. 182;

U. S. v. Iron Silver Min. Co., 128 U. S. 673,
32 L. ed. 572;

U. S. v. Maxwell Land Grant Co., 121 U. S.
325, 30 L. ed. 949;

Folk v. United States, 233 Fed. 177.

In *Paine v. Foster*, *supra*, the Supreme Court of Oklahoma, in a similar matter, announced the rule that if there is any evidence, however slight, tending to support the conclusion of the Secretary of the Interior, then his conclusion becomes final, and the courts will not review the weight of the evidence. Syllabus 5 of that case is as follows:

“ When the petition sets out all the evidence taken before the Land Department, the decision

of the register and receiver, and of the superior officers on appeal, and contains the allegation that the final decision of the Secretary of the Interior, adverse to the claimant, had no evidence or facts of any character for its basis, but that such decision was rendered without any evidence or circumstances whatever to warrant the same. A court of equity will review the evidence sufficiently to determine the question as to whether there was any evidence tending to support the secretary's conclusions, or from which a reasonable inference could be properly drawn, warranting his findings. If there is any evidence, however slight, tending to support the conclusion of the Secretary of the Interior in a controverted land case, or if there are facts and circumstances detailed in evidence from which such conclusions may be reasonably and rationally inferred, then such conclusions become final, and the courts will not review the weight of the evidence."

In *Hartwell v. Havighorst*, *supra*, the Supreme Court of Oklahoma held a petition seeking to attack the decision of the Land Department for alleged error of law bad for the reason that it failed to show that there was no evidence to support the decision of the Secretary of the Interior.

The Supreme Court of the United States, 196 U. S. 635, 49 L. ed. 629, affirmed the case of *Hartwell v. Havighorst*, which was grounded solely upon the

proposition that the petition in such a matter must affirmatively show that there was no evidence before the department.

In *Howe v. Parker*, 111 C. C. A. 466, 190 Fed. 739, the decision by this court turned entirely upon the question whether there was any evidence before the department.

In *Sanford v. Sanford*, 139 U. S. 642, 35 L. ed. 290, the Supreme Court announced the rule that the conclusions of the Land Department are not open to review for alleged errors of law in passing upon the *weight* of evidence presented to the department, for the reason that this would make a court of equity a reviewing court for the department, which was never contemplated by Congress.

In *DeCambra v. Rogers*, 189 U. S. 119, 47 L. ed. 734, it was held:

“ A decision of the Land Department upon question of fact is conclusive on the courts. It is hardly necessary to say that when a decision has been made by the Secretary of the Interior, courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination.”

In *M'Goldrick Lbr. Co. v. Kinsolving*, 137 C. C. A. 377, 221 Fed. 819, 826, it was said:

“ The Land Department is charged with the administration of the laws of Congress relative to the disposition of the public domain. It must see that the provisions of law are complied with by intending donees and purchasers, and is constituted a tribunal for determining and deciding all matters of fact pertaining to applications, entries, and proofs, and by the uniform holding of the Supreme Court its findings and decisions as to such matters are final and conclusive, if it be there is any pertinent testimony upon which to base them. If the officers of the Land Department err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reversed and annulled by the courts in controversies between private parties founded on their decisions; ‘but,’ says Mr. Justice FIELD in *Shepley v. Cowan*, 91 U. S. 330, 340 (23 L. ed. 424):

‘for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department, and perhaps, under special circumstances, to the President.’

“ See also, *Johnson v. Towsley*, 13 Wall. 72, 20 L. ed. 485; *Burfenning v. Chicago, St. Paul, etc., Ry.*, 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. ed. 175; *Johnson v. Drew*, 171 U. S. 93, 99, 18

Sup. Ct. 800, 43 L. ed. 88; *Gardner v. Bonestell*, 180 U. S. 362, 369, 21 Sup. Ct. 399, 45 L. ed. 574; *DeCambra v. Rogers*, 189 U. S. 119, 122, 23 Sup. Ct. 519, 47 L. ed. 734."

In *James v. Germania Iron Co.*, 46 C. C. A. 476, 107 Fed. 597, in discussing the effect of the finding of the Land Department of the Government, this court, by Judge SANBORN, said:

" The Land Department of the United States is a *quasi-judicial* tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, and its decisions of the issues presented at such hearings are impervious to collateral attack, and presumptively right. A patent to land of the disposition of which the Department has jurisdiction is both the judgment of that tribunal and a conveyance of the legal title to the land. 9 Stat. 395, c. 108, Sec. 3; Rev. St., Secs. 441, 453; *U. S. v. Winona & St. P. R. Co.*, 67 Fed. 948, 955, 15 C. C. A. 96, 103, 32 U. S. App. 272, 283. But the judgment and conveyance of the Department do not conclude the rights of the claimants to the land. They rest on established principles of law and fixed rules of procedure, which condition their initiation and prosecution, the application of which to the facts of each case determines its right decision; and, if the officers of the Land Department are induced to issue a patent to the wrong party by an erroneous view of the law, or by a gross or fraudulent mistake of the facts,

the rightful claimant is not remediless. He may avoid this decision, and charge the legal title derived from the patent which they issue with an equitable right to it on either of two grounds: (1) That upon the facts found, conceded, or established without dispute at the hearing before the Department its officers fell into an error in the construction of the law applicable to the case which caused them to refuse to issue the patent to him, and to give it to another (*Bogan v. Mortgage Co.*, 63 Fed. 192, 195, 11 C. C. A. 128, 130, 27 U. S. App. 346, 350; *U. S. v. Winona & St. R. Co.*, 67 Fed. 948, 958, 15 C. C. A. 96, 106, 10 U. S. App. 272, 288; *U. S. v. Northern Pac. Co.*, 95 Fed. 864, 870, 37 C. C. A. 290, 296; *Cunningham v. Ashley*, 14 How. 377, 14 L. ed. 46; *Barnard's Heirs v. Ashley's Heirs*, 18 How. 415, 15 L. ed. 285; *Garland v. Wynn*, 20 How. 6, 15 L. ed. 801; *Lytle v. Arkansas*, 22 How. 193, 15 L. ed. 306; *Lindsey v. Hawes*, 2 Black. 554, 560, 17 L. ed. 265; *Johnson v. Towsley*, 13 Wall. 78, 85, 20 L. ed. 485; *Moore v. Robbins*, 96 U. S. 530, 538, 24 L. ed. 848; *Bernier v. Bernier*, 1 U. S. 242, 13 Sup. Ct. 244, 37 L. ed. 152); (2) that through fraud or gross mistake they fell into a misapprehension of the facts proved before them, which had the like effect (*Gonzalez v. French*, 164 U. S. 338, 342, 17 Sup. Ct. 102, 42 L. ed. 458). If he would attack the patent on the latter ground, and avoid the Department's finding of facts, however, he must allege and prove not only that there was a mistake in the finding, but the evidence before the Department from which the mistake resulted, the particu-

mistake that was made, the way in which it occurred, and the fraud, if any, which induced it, before any court can enter upon the consideration of any issue of fact determined by the officers of the Department at the hearing. *U. S. v. Northern Pac. R. Co.*, 95 Fed. 864, 870, 882, 37 C. C. A. 290, 296, 308; *U. S. v. Atherton*, 102 U. S. 372, 374, 26 L. ed. 213; *U. S. v. Budd*, 144 U. S. 154, 167, 168, 12 Sup. Ct. 575, 36 L. ed. 384; *U. S. v. Mackintosh*, 85 Fed. 333, 336, 29 C. C. A. 176, 179, 56 U. S. App. 483, 490; *U. S. v. Throckmorton*, 98 U. S. 61, 66, 68, 25 L. ed. 93; *Marquez v. Frisbie*, 101 U. S. 473, 476, 25 L. ed. 800; *Steel v. Refining Co.*, 106 U. S. 447, 451, 1 Sup. Ct. 389, 27 L. ed. 226; *French v. Fyan*, 93 U. S. 169, 172, 23 L. ed. 812; *Ehrhardt v. Hogaboom*, 115 U. S. 67, 69, 5 Sup. Ct. 1157, 29 L. ed. 346; *Heath v. Wallace*, 138 U. S. 573, 575, 11 Sup. Ct. 380, 34 L. ed. 1063; *Barden v. Railroad Co.*, 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. ed. 992. The bill in the case before us is based on the first ground."

Having concluded that the only question involved in the case was, Did the Department err as a matter of law? the court thereupon stated:

" The only question, therefore, which is left for consideration, is whether or not this finding is sustained by the evidence, and it comes here with the presumption of soundness and with the burden on the appellants to show its error."

In *Durango Land Co. v. Evans*, 25 C. C. A. 523, 80 Fed. 425, the Circuit Court of Appeals for the

Eighth Circuit, in discussing the effect of a finding by the Land Department of the government, said:

“ And inasmuch as the findings of the Land Department on questions of fact are conclusive, when the charge is that the Land Department has erred in the decision of a mixed question of law and fact, what the facts were, as laid before and found by the department, must be shown, so as to enable the court to see clearly that the law has been misconstrued. * * * The court cannot say that the law was misconstrued by the officers of the Land Department, unless their findings upon questions of fact are disclosed or enough undisputed facts are disclosed which were proven before the department to make it plain that an error of law was committed. * * * The presumption is that all such questions are brought to the attention of the department and were duly considered and properly decided. * * * The burden was on the complainant, therefore, and it sought to reopen the controversy for errors of law to show what the facts were before the Land Department to show the law was applied.”

In *Colorado Coal & Iron Co. v. United States*, 123 U. S. 307, 31 L. ed. 182, it was alleged that the patents were void because made to fictitious persons not in being. The patents were attacked upon the alleged ground that the Coal Company had procured entries to be made in the name of fictitious persons for the sole purpose of acquiring the titles in the

company in fraud of the government, but it was held that even if the patent had been made to fictitious persons that they were not on that account void but voidable only, and it was further held that the government could prevail only by impeaching the patents upon the ground that they were procured by fraud. This case completely meets the contention of the government that a patent issued in the name of a person not in being is absolutely void.

In no event could the government show in this case that the patent is void because in virtue of various Acts of Congress upon the death of the citizen entitled to receive the allotment his heirs took precisely as the allottee would have done had he lived to receive his distributive share of the public domain. The issuance of the allotment certificate and the patent in the name of the dead citizen was, as we shall show conclusively, we believe, hereinafter, mere difference in form so that in every matter of substance the situation was the same as if the certificate and patent had issued in the name of the heirs. In the *Colorado Coal* case the government was held squarely to prove, if it could, that the patent was procured by fraud. For exactly the same reason the government here must be held to prove that the patent was issued on account of an error of law, that is to say, the government cannot prevail without clear, positive and

convincing proof that there was no evidence before the Commission upon the question, Was Barney Thlocco alive April 1, 1899. The *gravamen* of the government's alleged case is that there was no evidence before the Commission.

In the recent case of *Folk v. United States*, 233 Fed. 178, the Circuit Court of Appeals for the Eighth Circuit has fully and ably determined this entire question, using the following language:

“ Did the plaintiffs establish the fact that there was a strong probability that on the merits of this suit they would finally secure the relief they seek? They ask to avoid the deliberate adjudication of the Dawes Commission rendered more than 12 years before their suit was commenced, that Thomas Atkins was entitled in 1901 to enrollment as a Creek Indian, the allotment, and the patents based thereon, upon the ground, not that the Commission was induced by any fraud or misrepresentation to render that judgment, but that there was no information or evidence before the Commission to sustain its conclusion, and especially that there was none to warrant the indispensable preliminary finding (the Creek Agreement, Act March 1, 1901, 31 Stat. 870, c. 676, Sec. 28; Act June 28, 1898, 30 Stat. 502, c. 517, Sec. 21), that Thomas Atkins was living April 1, 1899. Conceding, but not considering or deciding, that the absence of such information or evidence would be fatal to the judgment of the Commission, a proposition

which counsel for the defendants strenuously challenge, was the evidence sufficient to establish that absence? The legal presumption was that there was information and evidence sufficient to sustain the judgment and the patents based upon it. The burden was on the plaintiffs to prove, not that there was insufficient evidence, but that there was no substantial information or evidence, to sustain the judgment. It was a heavy burden, one that could not be borne by the production of a mere preponderance of evidence, for it assails the validity of patents and of the judgment of a quasi-judicial tribunal empowered to render it, and neither of them could be successfully challenged without full proofs, clear, convincing, unambiguous, and entirely satisfactory to the court. *Maxwell Land Grant Case*, 121 U. S. 325, 379, 381, 7 Sup. Ct. 1015, 30 L. ed. 949; *Colorado Coal Co. v. United States*, 123 U. S. 307, 317, 8 Sup. Ct. 131, 31 L. ed. 182.

“ The only evidence the plaintiffs produced was the affidavit of Mr. Merrick, verified February 25, 1915, more than thirteen years after the event, that in May, 1901, he was a clerk and employe of the Dawes Commission, that on May 23, 1901, he ‘listed for enrollment as a citizen by blood of the Creek Nation, the name of Thomas Atkins who is enrolled opposite roll number 7913 of the final roll of the Commission and on census card No. 2707, field No. 2774, a true copy of which census card is hereto attached and made a part of this affidavit,’ that the evidence which induced him to list Thomas Atkins was ‘the authenticated 1895 roll of Creek citizens, which said

roll was used and relied upon by said Commission and by myself as the representative of said Commission in enrolling the name of Thomas Atkins.' The census card recorded these facts: That Thomas Atkins was a Creek Indian of half blood 10 years of age, that he was enrolled on the authenticated Creek tribal roll of 1895 as of Euchee township, under the name Thos. Atkins, No. 213, and that on that roll Minnie Atkins was recorded as his mother, and a white man as his father. Mr. Merrick further deposed that he had searched and found in the office of the Dawes Commission, where all such matters are kept, no memorandum or notation indicating that evidence or information was had or received by the Commission on the question whether Thomas Atkins was living or dead on April 1, 1899, and that he had no recollection of any such evidence or information had or received by himself, although somebody—who it was he said he could not recall—gave him information as to about the time of alleged birth and parentage of the said Thomas Atkins, that the final roll of citizens by blood of the Creek Tribe 'was made up from the said census card under my personal supervision and compared and reviewed by some member of the Commission, and the enrollment thus made was approved by the Secretary of the Interior on March 28, 1902.'

" On the other hand, Mr. Lyons, a witness called on behalf of the defendant, personally appeared before the court and testified that he had a conversation with Mr. Merrick in which the latter called attention to the fact that the census

card of Thomas Atkins showed his parentage, his mother and his father, that he could not have got that from the 1895 roll, and Lyons testified that Merrick said that he was satisfied from that fact that there must have been evidence on that question, and that there must also have been evidence or information of some character, which was not made of record, that Thomas Atkins was living on April 1, 1899, and further that he had no independent recollection of the whole matter, except that the enrollment was made in his handwriting. Mr. Lyons was cross-examined by counsel for the plaintiffs and testified that Mr. Merrick said that they must have had information as to the parentage probably from the 1895 roll, and he said also that they must surely have had information as to whether or not he was alive or dead on April 1, 1899, or they would not have enrolled him. Mr. Merrick's testimony was an *ex parte* affidavit introduced two days before Mr. Lyons testified in open court, and Mr. Merrick was not called to deny that Mr. Lyons' statement of his admissions was correct.

“ By the Act of June 10, 1896, the Dawes Commission was authorized to hear and determine applications for citizenship in any of the Five Civilized Tribes. By that act the rolls of citizenship of those tribes as then existing (and the Creek rolls of 1890 and 1895 were then existing), were confirmed and the Dawes Commission was commanded in determining applications for citizenship to ‘give due force and effect to the rolls, usages, and customs of each of said nations or tribes.’ 29 Stat. 339, c. 398, par. 3.

By the Act of June 7, 1897 (30 Stat. 84, c. 3), the term 'rolls of citizenship' as used in the Act of June 10, 1896, was construed to mean 'the last authenticated rolls of each tribe which have been approved by the council of the nations and the descendants of those appearing on such rolls,' and certain other persons specified that had been lawfully added thereto. By the Act of June 28, 1898 (30 Stat. 502, c. 517, Sec. 21), the Commission was authorized and directed to take the roll of Cherokee citizens of 1895 and to enroll all those living found on that roll and certain other persons specified, and 'to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud, or without authority of law, enrolling such only as may have lawful right thereto and their descendants born since such rolls were made.' That act further provided that:

" 'Said Commission shall make such rolls descriptive of the parties thereon, so that they may be thereby identified, and it is authorized to take a census of each of said tribes' (hence the authorized census card in this case), 'or to adopt any other means by them deemed necessary to enable them to make such rolls. They shall have access to all rolls and records of the several tribes.

• • • The rolls so made when approved by the Secretary of the Interior shall be final, and the persons whose names are found thereon, and their descendants thereafter born to them, with such persons as may in-

termarried according to tribal laws, shall alone constitute the several tribes which they represent.'

" The Act of March 1, 1901 (31 Stat. 869, c. 676, Sec. 28), provided that all citizens who were living on the 1st day of April, 1899, entitled to be enrolled under the Act of June 28, 1898, should be placed upon the rolls. The Act of June 28, 1898, was not simply an Act of Congress. It embodied and ratified the agreement between the Creek Nation and the United States, which was shortly after ratified by the Creek Nation, that the Dawes Commission should make the final roll of the latter's citizens, that for that purpose the Commission should have access to all its rolls and records, and that it might take a census of the nation or adopt any other means by the Commission deemed necessary to enable them to make such rolls. Among the rolls and records of the Creek Tribe, duly authenticated by the approval of the Creek Council, was a roll of citizens made by the tribe in 1890, another made in 1895, the pay roll of that nation for the year 1895, upon which a per capita payment was made to the citizens of the tribe. On the roll of 1890 appeared 'Minnie Atkins (Thos. and Mary, 2 children).' On the roll of 1895 appeared the names of Minnie Atkins and Thomas Atkins and the receipt of Minnie Atkins for a payment to herself and also for a payment of a like amount to her as the per capita payment due to her son Thomas Atkins.

" The Creek Tribe was a civilized and intelligent people governed by laws made by its own

Creek Council which was composed of two bodies, the House of Kings and the House of Warriors, under whose direction the census of its citizens and its rolls of citizenship were made. Noah Gregory testified that in 1889 and 1890, he was town king of Euchee township and a member of the House of Kings, that under the direction of the Creek Council, and as such town king, he made the original census roll of Euchee township, that after he made up this original census roll he reported it to the Creek Council, that the Creek Council appointed a committee of 16 from its membership, which investigated, purged, and corrected that roll and the rolls of the other towns, some 48 in number, then reported the corrected roll to the House of Kings and to the House of Warriors, and that each house separately approved and adopted it, and this roll thus made is the Creek roll of 1890, that he was a member of the House of Warriors when the roll of 1895 was made, and that it was approved by both houses. Mr. Gregory testified that after he had made up the original census roll of Euchee township for the enrollment of 1890, he called a convention of the people of that township, that the name of each one of those placed upon the original census roll by him was read out in the hearing of this convention, and with the assistance of suggestion and information made at the convention this original census roll was corrected, and that it was this corrected roll that he reported to the Creek Council, that on his original census roll under No. 26 were written 'Minnie Atkins, two children, female,' that

the word 'female' referred to Minnie Atkins, that on the list which he reported to the council, after the town meeting had purged and corrected it, as his original census roll there appeared 'No. 22, Marina Atkins and two children, No. 23, Thomas Atkins, No. 24, Mary Atkins,' that at the request of the Dawes Commission he examined the list of those the Commission proposed to enroll as Creek citizens from Euchee township in 1901 and 1902, including Minnie Atkins and Thomas Atkins, obtained what information he could concerning them and reported to the Commission regarding that list, that some on the tentative list he discovered had died before April 1, 1899, and he reported that fact to the Commission, together with any other relevant fact he discovered, but that he does not recollect all that he learned or all the information that he gave, that if he had learned that Thomas Atkins was not living on April 1, 1899, he would have reported, as he did regarding others that were on the tentative list of the Commission, that he died before April 1, 1899, but that he made no such report.

“ As the Commission was required by the Acts of Congress to give full force and effect to the authenticated tribal rolls, the usages and customs of each tribe and was by those acts given access to all their rolls and records, the Creek Rolls of 1890 and 1895, on each of which Minnie Atkins and Thomas Atkins as her son were enrolled as citizens of the tribe by blood, constituted not only *prima facie*, but, in the absence of strong and persuasive countervailing proof, con-

clusive evidence before the Commission of the right of Thomas Atkins to enrollment as a citizen of the Creek Tribe. In the face of this record counsel for the plaintiffs no longer contend in this court, as they pleaded in the court below, that 'no evidence of any character was produced before, or had or obtained by said Commission with respect to the right of the alleged Thomas Atkins under said Act of Congress to be so enrolled,' but they now argue that, although all the evidence and information disclosed above was before the Commission, there was no evidence before them that Thomas Atkins was living on April 1, 1899. The answer is, *first*, that the testimony of Merrick and Lyons tends to show that Merrick, who made the census card, had information that he was living before making that card, and made it in reliance upon such information; and, *second*, that the authenticated Creek roll of 1895 was conclusive evidence that he was living in that year, and, in the absence of any direct evidence before the Commission that he had died, or that he had been in such a dangerous situation that men of reasonable prudence would infer that he had died, prior to April 1, 1899, the conclusive legal presumption was that he continued to live for at least seven years after the making of the Creek roll in 1895, and hence that he was living on April 1, 1899. In the absence of proof of earlier death, or of evidence of unusual danger of such earlier death, the legal presumption is that a live person continues to live for at least seven years. *Fidelity Mutual L. Ass'n v. Mettler*, 185 U. S. 308, 316, 22

Sup. Ct. 662, 46 L. ed. 922; *Montgomery v. Bevans*, 1 Sawy. 653, 17 Fed. Cas. 628 No. 9735; *N. W. Mutual Life Ins. Co. v. Stevens*, 71 Fed. 258, 260, 18 C. C. A. 107, 109; *The San Rafael*, 141 Fed. 270, 278, 72 C. C. A. 388, 396; *Executors of Clarke v. Canfield*, 15 N. J. Eq. 119, 122, 123; *Lawson on Presumptive Evidence* (4th ed.), rule 43, pages 251, 253, 255; 13 Cyc 295, 298, note 'b'.

“ So it is that all the claims and reasons for the avoidance of the judgment of the Commission and the patents, and for the appointment of a receiver and an injunction on the theory of the original bill, fell disproved by the evidence produced upon the motion for the appointment of the receiver.”

At the conclusion of the evidence on behalf of the government, the trial court rendered an opinion upon the evidence which appears in the Printed Record commencing at page 109, and reference to the fact that the government not only failed to show that there was no evidence before the Dawes Commission upon the question, Was Barney Thlocco alive April 1, 1899, but also showed by its own witnesses that there was evidence before the Commission. The opinion is as follows:

“ *By the Court:* I am going to announce my view of what the Government has sought to establish by the evidence offered in support of its contention that the Commission acted without

evidence in enrolling Barney Thlocco. Last night or yesterday evening when the court adjourned the evidence of the Government had just closed in relation to that allegation of the Government's bill that the enrollment of Barney Thlocco had been made by the Commission to the Five Tribes without any evidence whatever relating to the fact as to whether he was alive or dead April 1, 1899. The court held in a prior stage of the case that it would be necessary, first, in order of proof, for the Government to support that allegation by proof sufficient to make a *prima facie* case. Since the adjournment yesterday evening I have reviewed the evidence in this case, so far as it relates to that feature of the case. The question is: Has the Government made a *prima facie* case on that point? That is, has it by clear and convincing proof shown to the court that the Commission acted in enrolling Thlocco without any evidence whatever? If the proof, on the other hand, clearly convinces the court that it did have evidence, or if the proof is such as to leave the court's mind in a state of doubt as to whether there was evidence or not, in my judgment the Government has failed to establish that *prima facie* case. I have examined, as I say, the evidence of all these witnesses, Mr. Merrick, Mr. Hastain, Mr. Hopkins, Mr. Bixby and Mr. Lieber in particular. Mr. Merrick's testimony in view of the fact that he himself made the card, probably affords the court the most direct light upon the controversy. A very significant feature of the case as developed by Mr. Merrick's testimony and as developed by a

comparison of the census card as made by him on May 24, 1901, with the old census card is this: That whereas the evidence differs that in other instances, a greater or less number of instances, the census cards which were made on that date and on the prior days in May were made from the tribal rolls and the census card, in this case it clearly develops that the census card which Mr. Merrick made must have been made on evidence outside of and in addition to the rolls and the old census card, for the reason that the age of Barney Thlocco and his post-office address is given as different from that which appeared on the census card. It follows, therefore, that as to those particular statements there must have been before Mr. Merrick evidence in addition to that contained in the documents to which I have referred. It doesn't follow as a matter of positive conclusion that that evidence affected the question as to whether Barney Thlocco was living or dead April 1, 1899, but it does show that Mr. Merrick in the case of that card didn't just follow the rolls and the old census card and take no further evidence whatever. There must have been before Mr. Merrick some investigation outside of those documentary features. The evidence is clear here that at the time these cards were made up, Barney Thlocco's as well as the others, the Commission with its large force was there securing as far as it could evidence sufficient to enable it to complete these census cards which were to become the basis of the schedules which would finally be forwarded to the Secretary for his approval and make up the roll. There

was the tribal council in session, the Town Kings were there. The evidence clearly shows that they had access to the Town Kings, that they had parties out bringing in evidence. That the evidence in enrolling the Creeks was largely, almost entirely, except in contest cases, oral and not made a matter of record, so that unfortunately we have not now here any record to show what was before the Commission, but in view of that and in view of the evidence here the court can't say as a fact—can't find as a fact—that there was no evidence before the Commission on that day or that there was no evidence at some subsequent time pursuant to investigation which the Commission made, and made before the schedule was made up and forwarded to the Secretary, can't find as a fact from the evidence in this case in my judgment that there was no such evidence. There has been offered in evidence here and permitted to become a part of the record the proceedings of October 16, 1903, which appears to have been in the course of an examination with regard to certain unaccounted for Creeks, a great number of them. It appears that when the Town King was being examined that he was questioned with regard to Barney Thlocco's name on the roll and he speaks of him as Barney Thlocco on the 1890 roll. As Barney on the 1895 rolls. He is asked with regard to his death in relation to the burning of a certain hospital or house of some character. There is evidence that that is a circumstance to show that that was the investigation, and the only investigation which the Commission ever made with

regard to the question of Barney Thlocco's existence on April 1, 1899. That was permitted as a circumstance, but when considered in connection with the evidence of Mr. Merrick, Mr. Hastain, Mr. Bixby and Mr. Hopkins with regard to the manner in which this enrollment was handled, the statement of these gentlemen, offered by the Government, their positive statements that there must have been evidence with regard to Barney Thlocco's existence April 1, 1899, or his name would not have been forwarded for enrollment; in view of those statements the court cannot find that this evidence clearly and convincingly establishes the fact that there was no evidence prior to the time the schedule was forwarded. If that is true as I view the province of this Commission, it was made an agency of the Government to determine the question of Barney Thlocco's right to enrollment, and when that question was determined and the questions of fact determined by that Commission necessary to establish his right to enrollment, those questions of fact when the enrollment is approved by the Secretary of the Interior stand as determined for all time, in all courts until they are attacked because of having been based upon fraudulent testimony or having been arbitrarily found without any testimony. I may be wrong. I have heard arguments for two days in this matter. Of necessity counsel on the contending side disagree, but that is my judgment in the matter, and in view of the prior holding of the court and in view of the conclusion which I reach from this evidence, in my judgment, the Government has

failed to establish the *prima facie* case with regard to the lack of evidence as to the existence of Barney Thlocco April 1, 1899, and, therefore, is not permitted to now inquire into the fact as to whether or not he was in fact living."

Manner of Enrollment Adjudicated as Well as Right to Enrollment.

In the case of *Nunn v. Hazelrigg*, 132 C. C. A. 474, 216 Fed. 330, the Circuit Court of Appeals for the Eighth Circuit held: "When the Commission found * * * a person was entitled to enrollment *the manner in which he was found to be entitled to such enrollment was adjudicated* as much as the mere fact of the right of enrollment. The cases are so numerous that it will be useless to stop to cite them." (Italics ours.)

The Court Will Not Consider the Extent of Investigation by Commission.

The courts will not inquire as to the extent of the investigation and knowledge of the Commission on the points decided by the Commission nor inquire as to the methods by which the Commission reached their determination. As was said in DeCambra v. Rogers, 189 U. S. 119, 47 L. ed. 734: "It is hardly necessary to say that when a decision has been made

by the Secretary of the Interior, courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided or as to the methods by which he reached his determination.” Upon the same point, in *Orchard v. Alexander*, 157 U. S. 372, 39 L. ed. 737, it was said: “But the grant of power to the local officers was not limited by the manner in which they exercised that power and does not rest at all upon the kind of evidence upon which they act.” This court has held that the courts cannot *weigh* the evidence before a land department of the government.

As to Order of Proof.

The trial court correctly held that the government must first prove that there was no evidence before the Commission before a retrial of that issue. In *Goings v. Chapman*, 18 Ind. 194, the correct rule as to order of proof in such a matter is stated thus:

“ Generally the order of time for the introduction of evidence to support the action or defense must be left to the discretion of the party who introduces the evidence. But where a previous fact is necessary to be proved to render the offered evidence at all relevant, such fact must be first proved.”

F.

The presumption is that there was evidence to support the Commission's finding.

—*United States v. Iron Silver Min. Co.*, 128 U. S. 673, 32 L. ed. 571;

Colorado Coal Co. v. United States, 123 U. S. 307, 31 L. ed. 182;

James v. Germania Iron Co., 46 C. C. A. 476, 107 Fed. 597.

In *United States v. Iron Silver Min. Co.*, *supra*, the Supreme Court said:

“ The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the government charged with the alienation of public lands can only be overcome by clear and convincing proof.”

In *James v. Germania Iron Co.*, *supra*, the court said, with reference to the decision of the Land Department:

“ It comes here with the presumption of soundness and with the burden on the appellants to show it is error.”

G.

The burden is upon the complainant, however difficult the undertaking, to prove a negative.

—*Maxwell Land Grant Case*, 121 U. S. 325, 379, 30 L. ed. 949;

Colorado Coal & Iron Co. v. United States, 123 U. S. 307, 31 L. ed. 182;

Durango Land & Coal Co. v. Evans, 80 Fed. 425;

James v. Germania Iron Co., 107 Fed. 597;

Folk v. United States, 233 Fed. 177.

In *Colorado Coal & Iron Co. v. U. S.*, *supra*, the Supreme Court said, with reference to the character and degree of proof necessary to impeach the judgments of the Land Department:

“ We have had recent occasion to consider the question of the character and degree of proof necessary in such cases to invalidate titles held by purchasers in good faith for value and without notice, under patents issued by the United States. In the *Maxwell Land Grant* case, 121 U. S. 325, 379 (30:949, 958), it is said: ‘The deliberate action of the tribunals to which the law commits the determination of all preliminary questions, and the control of the processes by which this evidence of title is issued to the grantee, demands that, to annul such an instrument and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to

the court, and that the case itself must be entirely within the class of causes for which such an instrument may be avoided. * * * We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidence of title emanating from the government of the United States under its official seal? In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the President of the United States himself, shall be de-

pendent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful.'

" It thus appears that the title of the defendants rests upon the strongest presumptions of fact which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing, and unambiguous. *The burden of producing these proofs and establishing the conclusion to which they are directed rests upon the government. Neither is it relieved of this obligation by the negative nature of the proposition it is bound to establish.*" (Italics ours.)

H.

The judgment of the Commission may be rebutted only by full, clear, convincing and unambiguous proof that there was no evidence before the Commission to sustain its finding.

Not only was the burden upon the government to prove a negative, but it cannot recover without clear, convincing and unambiguous proof of that negative, as was held in the *Maxwell Land Grant* case, *supra*. How did the government meet this burden? The Commissioner to the Five Civilized Tribes who enrolled Barney Thlocco and transmitted the enroll-

ment to the Secretary of the Interior for approval and the enrolling clerks who assisted the Commission, were produced by the government and testified both upon direct and cross-examination, that there was an investigation of the question whether Barney Thlocco was alive April 1, 1899; that such was the practice of the Commission, and that in no case was a name recommended for final approval by the Secretary without evidence—in short, the complainant offered in support of the bill exactly the same evidence that the defense must have offered if the government had made a showing such as to impeach the judgment of the Commission and Secretary. The government has never prevailed under the same like circumstances. Not only was there an utter failure of proof to support the bill, but the complainant showed most clearly and convincingly that the hearing in the case of Barney Thlocco was regular, according to the approved practice in the department and that the finding was made upon substantial evidence.

I.

The jurisdiction of the Commission was analogous to the jurisdiction of the Land Department in the Government in land cases.

—*Wallace v. Adams*, 74 C. C. A. 540, 143 F. 716.

It has been held so often that the jurisdiction

the Commission to the Five Civilized Tribes and the Secretary of the Interior and the effect of their action in an enrollment matter, are the same in effect as the jurisdiction and effect of the action of the Land Department of the United States in the disposition of public lands within its control, that it would appear that no authority is necessary to support the proposition.

In *Wallace v. Adams, supra*, in defining the jurisdiction of the Commission to the Five Civilized Tribes, commonly known as the Dawes Commission, it is said:

“ *The jurisdiction of the Commission and of the Secretary and the effect of their action in the allotment of lands of the Choctaw and Chickasaw Nations are the same in effect as the jurisdiction and effect of the action of the Land Department of the United States in the disposition of the public lands within its control. The Commission under the direction of the Secretary constitutes a special tribunal vested with the judicial power to hear and determine the claims of all parties to allotments of these lands and to execute its judgments by the issue of the allotment certificates which constitute conveyances of the right to the lands to the parties who it decides are entitled to the property. This tribunal undoubtedly has exclusive jurisdiction to determine such claims and to issue such a conveyance. The allotment certificate when issued, like a patent to land, is dual in its effect. It is an ad-*

judication of the special tribunal empowered to decide the question that the party to whom it issues is entitled to the land and it is a conveyance of the right to this title to the allottee."

The jurisdiction of the Commission in the allotment of lands in the Creek Nation was the same as in the tribes above referred to in *Wallace v. Adams*.

J.

The Commission was authorized "to detail clerks to aid in the performance of their duties" and "to use every fair and reasonable means within their reach" for the purpose of making the final rolls. If the Commission had enrolled Thlocco upon evidence heard by a clerk the enrollment nevertheless would have been *quasi-judicial* and not merely administrative. But the Commission as a body "thoroughly examined the evidence" and from the evidence enrolled Thlocco.

It is stated in the certificate by the judges of the Circuit Court of Appeals that the enrollment of Thlocco was purely administrative and not judicial. We shall show, *first*, that viewed as a statement of fact this is error, and *second*, that viewed as a statement of law it is in open conflict with many decisions of this court. The Commission as such thoroughly

examined the evidence and passed upon the same judicially. The Commissioners, under date of March 3, 1902, in the matter of the enrollment of Barney Thlocco and others, certified to the Secretary of the Interior (Print. Rec., p. 96): "The Commission after having thoroughly examined the rolls of the Creek Nation and such evidence as has been submitted touching the identification of the persons on roll herewith submitted, is of the opinion that all are entitled to enrollment as Creek citizens by blood and should be so enrolled." This judgment was signed by the Commission to the Five Civilized Tribes and by each of the Commissioners. Mr. Bixby, former Chairman of the Commission, who was present superintending the work of the enrolling party at Okmulgee when the name of Barney Thlocco was listed for enrollment, a witness upon behalf of the government, testified (Print. Rec., p. 97) that the Commission in the case of every enrolled citizen, including that of Barney Thlocco, made a complete and perfect investigation and that the Commission was satisfied from evidence taken that each and every one enrolled was entitled to citizenship. He further testified that some members of the Commission at some place and by evidence outside of the rolls personally investigated the right of each person for enrollment, saying: "I know; I was on the job all the time and I was satisfied that every one on the rolls was entitled

to be on the rolls." The chairman further testified that when he was in charge of the enrolling party at Okmulgee upon the occasion of Barney Thlocco's enrollment, there were appearing before him almost constantly prominent men of the Creek Nation, heads of the different towns and town kings, who were giving information as to the rights of citizens to be enrolled and as to whether or not they were living on the first of April, 1899. Continuing, the witness said that he was continually surrounded by persons informing them on that point; that he was getting all the information he could from every source. The enrolling clerk Merrick testified that when he listed Barney Thlocco for enrollment and completed his card at Okmulgee that he must have done so upon evidence and upon the question, Was he alive April 1, 1899. The witnesses also testified that after the return of the enrolling party from Okmulgee to Muskogee a further investigation was continued until the Commission was satisfied in each particular case that witnesses appeared before the Commission at Muskogee and that field parties were sent out to gather and bring evidence to the Commission. The chairman testified, in part, as follows: "Both before and after May 24, 1901, we were investigating all the time as to those persons whose names we listed on incomplete cards. I have no doubt but what we would subsequently conduct an investigation as to those

whose cards were incomplete or as to the particular ones we then listed as unaccounted for, not as to them only but we investigated all the time everybody that there was any doubt about." (Print. Rec., p. 100.) Answering a question as to the meaning of the Commissioners' certificate to the Secretary of the Interior above referred to, the chairman said that the *Commission* was satisfied that every one of the men enrolled were entitled to enrollment. Note that the Chairman of the Commission did not limit this finding to any particular member of the Commission, but expressly stated that the *Commission* was satisfied in each case. The Commission understood they were passing judgment judicially in these matters, as will appear at pages 6 and 7 of the Annual Report of the Commission to the Secretary of the Interior filed October 3, 1898, where the Commission said, in discussing the various Acts of Congress requiring the Commission to make correct rolls of the tribes, eliminating from the tribal rolls such names as should be stricken therefrom: "*This compels the Commission to pass judicial judgment upon the right to citizenship of every name upon the citizenship roll of each of the five tribes. No clerk or other substitute can do this work. It must be done personally by the Commission and upon a hearing of evidence in each case where there is any question.*"

Nowhere in the record does it appear that the Commission did not sit as a body to determine the case of Barney Thlocco. If the law required the Commission to so sit, the presumption is that it did do so. If the Commission was required to sit in a body to pass on the case, having certified as a part of Thlocco's enrollment record that they, all the Commissioners, had considered the case and had determined it upon the evidence, the burden was upon the government to impeach the certificate of the Commissioners, if, indeed, it could be done. Nowhere does the record show that witnesses did not appear before the Commission as such and testify in the case of Barney Thlocco. They may have done so. If this was required, the presumption is that it was done. How diligent the Commission was in these matters specially appears in the 9th Annual Report for the fiscal year ended June 30, 1902, commencing at page 32, and in the 10th Annual Report for the fiscal year ended June 30, 1903, at pages 28 and 29.

But we maintain that if only an enrolling clerk heard the evidence, reported his conclusions to the Commission and that the Commission adopted his judgment as their own, this was a compliance with the law.

At section 20 of the Act of June 28, 1898, there is a provision authorizing the Commission to detail competent clerks to perform their duties, as follows:

“ That the Commission hereinbefore named shall have authority to employ, with approval of the Secretary of the Interior, all assistance necessary for the prompt and efficient performance of all duties herein imposed, including competent surveyors to make allotments, and to do any other needed work, *and the Secretary of the Interior may detail competent clerks to aid them in the performance of their duties.*”

The Act of June 10, 1896, 29 Stat. 321, provides :

“ In the performance of such duties said commission shall have power and authority to administer oaths, to issue process for and compel the attendance of witnesses and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now residing beyond the limits of said territory, *and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong,* and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes.”

There are various other sweeping provisions committing this entire matter to the judgment of the commission not only in matters of substance but of

procedure. The two sections of law above quoted are sufficient for the point, the one authorizing the Commission to employ clerks and delegate to the clerks the performance of the duties of the Commissioners, the other authorizing the employment of "every fair and reasonable means." Perhaps Congress realized that it was quite impossible for the Commissioners as a body to hear all the evidence, and therefore provided that clerks might be employed to aid the Commissioners in the discharge of their duties. Certainly said clerks had powers analogous to masters in chancery or referees. They could hear evidence, report the facts, make conclusions, and the Commission might lawfully adopt their conclusions.

The contention that the enrollment of Thlocco was purely administrative and not *quasi-judicial*, viewed as a statement of law is in conflict with the following and many other authorities:

St. Louis Smelting Co. v. Kemp, 14 Otto. 104, U. S. 636, 26 L. ed. 875, 876;

Noble v. Union River Log. Co., 147 U. S. 165, 37 L. ed. 123, 127;

United States v. Hitchcock, 190 U. S. 316, 47 L. ed. 1074;

Orchard v. Alexander, 157 U. S. 372, 39 L. ed. 737;

Lytle v. State of Arkansas, 9 How. 315, 13 L. ed. 153;

Kimberlin v. Commission to the Five Civilized Tribes, 44 C. C. A. 109, 104 Fed. 653;

Nunn v. Hazelrigg, 132 C. C. A. 474, 216 Fed. 330;

Malone v. Alderdice, 129 C. C. A. 204, 212 Fed. 668;

Folk v. United States, 233 Fed. 177.

In the case of the land department of the government, it has been held that the finding is none the less *quasi-judicial* and no less conclusive because of the fact that the land officers were not present when the proof was taken. Such is the case of *Lytle v. State of Arkansas*, 9 How. 315, 13 L. ed. 153, 160, where it was said:

“ The law did not require the presence of the land officers when the proof was taken, but, in the exercise of his discretion, the Commissioner required the proof to be so taken. Having the power to impose this regulation, the Commissioner had the power to dispense with it, for reasons which might be satisfactory to him.”

In *St. Louis Smelting Co. v. Kemp*, 14 Otto. 104 U. S. 636, 26 L. ed. 875, 876, this court said, in speaking of the land department:

“ In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration and to pass upon its competency, credibility and weight. In that respect they exercise a judicial function and therefore it has been held in various instances by this court that their judgment as to matters of fact properly determinable by them is conclusive when brought to notice in a collateral proceeding; their judgment in such cases is like that of other special tribunals upon matters within their exclusive jurisdiction unassailable except by a direct proceeding for its correction or annulment.”

In *Noble v. Union River Logging Co.*, 147 U. S. 167, 37 L. ed. 127, this court held that a decision by the land department similar to that passed upon by the Commission in this case was judicial and not merely administrative.

The question whether the finding of the Dawes Commission was administrative purely or *quasi-judicial* does not depend upon the extent of the inquiry made by the Commission, for, as was held in *DeCamba v. Rogers*, 189 U. S. 119, 47 L. ed. 734, where a similar decision by the Secretary of the Interior was involved:

“ It is hardly necessary to say that when a decision has been made by the Secretary of the Interior, courts will not entertain an inquiry as

to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination.”

In *United States v. Hitchcock*, 190 U. S. 316, 47 L. ed. 1074, 1078, this court said, in a matter similar to that here involved:

“ Congress has constituted the land department under the supervision and control of the Secretary of the Interior a special tribunal with judicial functions to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands.”

In *Orchard v. Alexander*, 157 U. S. 372, 39 L. ed. 737, it was said:

“ But the grant of power to the local officers is not limited by the manner in which they exercise that power and does not rest at all upon the kind of evidence upon which they act. Their adjudication must be final in all cases or it is final in none. The approval of the evidence offered in respect to settlement and improvements is only *quasi*-judicial. It is as much an administrative as a judicial act.”

There are many other authorities to the same effect. It has been held from the first that the enrollment of citizens of the Five Civilized Tribes is analogous to the findings of the land department of

the government and that such enrollment by the Commission is not merely administrative but *quasi-judicial*. The government has taken the untenable position that the courts have general supervisory power over the Commission by which to control their decisions upon questions within their jurisdiction. This has never been the law, and to so announce now would lead to endless confusion. This court said, in *United States v. Hitchcock, supra*:

“ The court has no general supervisory power over the officers of the land department by which to control their decisions upon questions within their jurisdiction.”

K

The Creek Nation was represented by an attorney and by head men of the tribe at the time of Thlocco's enrollment. If the hearing was *ex parte* it was such only as to the heirs and not as to the government or the Creek Nation.

It is suggested that the hearing in the case of *Barney Thlocco* was *ex parte* and that the rule announced in *United States v. Minor*, 114 U. S. 233, 29 L. ed. 110, applies. This is an entirely different case. There it was held that where by fraud or imposition on the government officers a claimant has procured public land upon a showing made entirely

ex parte by and upon the side of the person who works the imposition upon the government officers, that the United States may show in a direct attack to set aside patent the fraud *intrinsic* in the hearing before the department. Minor invoked the case of *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93, in which it was held, the case being contested, that the unsuccessful party could complain of fraud only when it was *extrinsic* to the hearing. In the *Minor* case the court showed that the *Throckmorton* case had no application because Minor had procured his title by his own fraudulent acts, *the government not having undertaken any investigation in the matter at all, no agent of the government having been upon the ground to examine the land in question, and the whole case turning upon the affidavit furnished by Minor as to the land.* But the case of *United States v. Minor* has no application in this case because the government, through its officers, acting upon behalf of the Creek Nation, took the initiative, and if the proceeding must be regarded as *ex parte* it was so because the government sought and procured the only evidence that was before the Commission. The rule in the *Minor* case, therefore, would bar the government, which participated in that hearing, from proceeding against the enrollment except for *extrinsic* fraud, as was held in the *Throckmorton* case.

**Creek Attorney, Creek Commission and Town Kings
All Present at Thlocco's Enrollment.**

The Creek attorney was present at Okmulgee when Barney Thlocco's name was listed for enrollment. (R., 77, 84.) The Creek Commission, composed of head men of the tribe whose business it was to carefully safeguard the interest of the tribe, were present and participating. (R. 77, 93). The Town Kings and Warriors, who constituted the two branches of the Creek legislative body, were present aiding and assisting the Commission. These Kings and Warriors, and other persons, appeared almost constantly before the Commission giving evidence as to the Creeks not accounted for until that hearing. (R. 86). Practically the entire force of the Commission was at Okmulgee investigating, hearing evidence and enrolling those who were accounted for, completing the roll card, as in the case of Thlocco, where they were entirely satisfied from the evidence and tentatively enrolling those about whom they were not entirely satisfied, holding such tentative roll cards for subsequent investigation. (R., 76, 94.)

It cannot be said that the hearing was *ex parte* as to the Creek Nation or the government, because the Creek Nation was represented by its attorney,

by the Creek Commission, by the Town Kings and Warriors, and by the Commission itself.

In the case of *Folk v. United States*, 233 Fed. 177, there was involved an enrollment made at Okmulgee under circumstances similar to that of Thlocco. It was held by the Circuit Court of Appeals that the hearing was not *ex parte*, the court saying, relative to the presence of the Creek Attorney: "And there is the fact that under the Creek Agreement the tribe had the right to appear before the Commission and by its agent and attorney, who during all the enrollment proceedings was under retainer and salary to protect the rights of the tribe and to prevent the enrollment by the Commission of Thomas Atkins if he was not entitled thereto, and the Creek Agreement that if this was not done the roll of the Commission should be final."

The evidence is not entirely clear as to whether or not any person or persons appeared at Okmulgee to request the enrollment of Barney Thlocco, though it is entirely clear from the evidence that *a witness or witnesses did personally appear before the Commission at Okmulgee and testified with reference to Thlocco being alive April 1, 1899.* The enrolling clerk testifies that the memoranda made on that occasion shows that some one must have appeared and

given evidence on the point, but such witness or witnesses may have been produced by the Creek Nation through its attorney or through the Creek Commission. All the United States Marshal's force were scouring the country where the full-bloods lived to bring in witnesses to give evidence with reference to the right of the "unaccounted for" Creeks to be enrolled. There is no evidence, therefore, that the heirs or anyone upon their behalf requested the enrollment of Thlocco. The evidence shows quite conclusively that the witnesses testifying on the point were produced by the Commission to the Five Civilized Tribes or by some of the various representatives of the Creek Nation. We apprehend that no such investigation as this has ever been held to be *ex parte* as to the government or as to an Indian tribe.

L.

To sustain the government would be to destroy the rules of property established by the uniform decisions of the Circuit Court of Appeals for the Eighth Circuit extending over a period of seventeen years, to destroy utterly many land titles in the hands of innocent purchasers, and to cloud hopelessly many thousands of titles without so much as a forum, ex

cept at the will of the government as complainant, to test their validity.

For seventeen years, commencing with the case of *Kimberlin v. Commission to the Five Civilized Tribes*, 104 Fed. 653, the Circuit Court of Appeals for the Eighth Circuit has had uninterrupted appellate jurisdiction over the Indian Territory side of the state, and since statehood has passed upon nearly every important litigated Indian question, and since the *Kimberlin* case it has continued to declare that the Dawes Commission was a *quasi-judicial* tribunal and that its judgments and decrees were not open to collateral attack. This conclusion was reached by the Circuit Court of Appeals *whether dealing with groups of Indians or with individual cases. The action of the Commission was quasi-judicial, whether dealing with Indians as a class or dealing with the particular Indian in the matter of enrollment.* Under these holdings of the court vast property rights have grown up, and if this question is now treated as open and is decided adversely to the holdings of the Eighth Circuit, great confusion and loss will necessarily ensue. When this action was commenced counsel for the complainant realized that in order to bring themselves within the long-established decisions of the Eighth Circuit the government must allege either a mistake of law, a gross

mistake of the facts proved, or fraud. As we have shown fully elsewhere, the bill is upon the theory that there was a mistake of law, but having failed to establish the allegation that there was no evidence before the Commission as to whether or not Thlocco was alive April 1, 1899, the government now attempts to change its theory and asks the Supreme Court to strike down the decisions of the Circuit Court of Appeals for the Eighth Circuit extending over so many years. We show in another part of this brief that widespread disaster would result if these well-considered and long-accepted opinions are overturned.

The east half of Oklahoma has been burdened already with litigation almost beyond endurance. In the spring and summer of 1898 the government commenced, at Muskogee, Oklahoma, actions involving the validity of about 30,000 conveyances made by citizens of the Five Civilized Tribes, alleging no fraud but raising questions of law only. It was urged thereforcibly that this great burden of litigation was not necessary for the determination of some eighteen law questions presented by all that vast group of cases. Since the commencement of those actions almost all the points involved have been determined in favor of the defendants. It is now a matter of common knowledge that homeseekers from the other

states will hardly seriously consider the purchase of Indian land in the State of Oklahoma. This uncertainty in land titles has resulted disastrously to the Indians themselves. When their lands came on the market by removal of restrictions, or when the owners became of age, possible purchasers were few in number and very timid. It is impossible for us to believe that this court will further impair land titles in that part of Oklahoma formerly Indian Territory by striking down decisions by the Circuit Court of Appeals extending over a period of almost twenty years.

The lower court at the conclusion of the trial in this case, seeing the disastrous results of the government's contention if sustained, said:

“ In my judgment if the contention of the Government is sound it means that these thousands of allotments and patents which have been issued here upon the faith of the enrollment of the Commission to the Five Civilized Tribes of these Indians, can now be attacked and set aside by actions of this court, merely upon a showing that the Commission although finding, for instance in the case of the Creek Nation that the allottee was living April 1, 1899, made a mistake and that in as much as they made that mistake it devolved upon this court to re-try that issue. I may be wrong but as I view the law that would be a holding contrary to the law, contrary to

public policy and a holding which I cannot make in this case." (Print. Rec., 108.)

M

The government asks for the establishment of a new rule which would permit the United States in a court of equity to retry a question of fact already passed by a land department of the government without first impeaching the finding of the department upon one of the recognized grounds of attack, namely, for error of law, gross mistake of fact, or for fraud.

After much research, we are quite prepared to say that never in the history of the government have the courts announced the rule contended for by the government or anything similar to it. The government not having offered one scintilla of evidence to support the theory upon which the bill was framed, seeks a new rule both revolutionary and appalling. This court is asked to say that the judgment of the Commission is an entire nullity without the government impeaching the judgment of the Commission. This would make the court a Dawes Commission and treat the whole matter of enrollment as open.

N

The hearing in the case of Thlocco was exactly the same as in all other uncontested cases. Thlocco was "accounted for" at the hearing at Okmulgee, the capital of the Creek Nation, though subsequent investigation was made to verify the conclusion reached at the Okmulgee hearing. The presumption of continued life considered. The high points of the government's testimony showing that Thlocco was enrolled regularly, restated.

By reference to the brief abstract of the evidence at the beginning of this brief, it is entirely clear that *Thlocco was enrolled precisely as all other Indians in uncontested cases*. While he was "unaccounted for" prior to the Okmulgee hearing, he was "accounted for" at that hearing and his roll completed. He was on the 1890 roll and on the 1895 roll and enrolled on an old census card made in the year 1898, or thereabout. All these rolls were before the Commission at Okmulgee. They were required by law to give full force and effect to each of these rolls. Merrick, the enrolling clerk, completed the roll card. He and all the other witnesses upon behalf of the government who testified on this point stated that this enrollment card completed in the form in which it appears in the evidence signifies that there must have been before the enrolling party at Okmulgee

evidence showing that Barney Thlocco was alive 1899 or the card would not have been made in that form. The enrolling clerk says there must have been such evidence before him on that occasion. He further testifies that some one must have appeared before him and given testimony on that occasion as to the right of Barney Thlocco to be enrolled. The evidence further shows that there were two classes of cards made at Okmulgee; the one complete and the other incomplete, the completed cards being made only in cases where the Commission were satisfied that the member enrolled was alive April 1, 1899, the other class, incomplete cards, which were reserved for investigation upon that point; but that in both classes of cases there was subsequent investigation until the Commission became thoroughly satisfied upon all the points involved. We unhesitatingly assert that careful review of all the evidence upon behalf of the government will show conclusively that Barney Thlocco was enrolled regularly upon a hearing and upon evidence as regards all the points relating to his right to be enrolled.

Presumption of Life.

It is admitted by the government that Thlocco was alive January, 1899, and that at the time of his enrollment the various tribal rolls were before the

Commission. The presumption of law is that he lived at least seven years from and after the time last accounted for, and the burden is upon the government to show that at the hearing in the matter of Barney Thlocco's enrollment this presumption was overcome by proper proof. The tribal rolls considered, the presumption of continued life is such as to be conclusive in this case. *Folk v. United States*, 233 Fed. 177.

PROPOSITION TWO.

THE ATTEMPTED CANCELLATION OF THLOCCO'S ENROLLMENT WAS WHOLLY VOID. THE SECRETARY'S ORDER DOES NOT PURPORT TO AFFECT THE TITLE OR THE PATENTS, HE HAVING HELD EXPRESSLY THAT THE PATENTS HAD ISSUED AND HAD BEEN DELIVERED.

Counsel for the government practically concede that there is no merit in the contention that the trial court erred in excluding the evidence showing the attempted cancellation of Thlocco's enrollment. But counsel for Bissett and others contend that this act of the Secretary shifted the burden of proof.

The facts relating to the attempted cancellation of the enrollment of Thlocco appear in the letter of Commissioner Tams Bixby to the Secretary of the Interior dated October 10, 1906 (record, both Original and Print, page 59), which letter is as follows:

“ Muskogee, Indian Territory,
October 10, 1906.

“ *The Honorable, The Secretary of the Interior.*

“ Sir: August 25, 1904, the Commission to the Five Civilized Tribes transmitted to the Department a communication from the attorney for the Creek Nation in the nature of a motion to reopen the matter of the right to enrollment of Barney Thlocco, deceased, whose name is contained in a partial list of citizens by blood of the Creek Nation approved by the Secretary of the Interior March 28, 1902, opposite No. 8592. Said motion was accompanied by an affidavit executed by Wilson Knight and Barney Yahola to the effect that said Barney Thlocco died prior to April 1, 1899.

“ The Commission to the Five Civilized Tribes, in its report transmitting said motion and affidavit, recommended that the case be reopened and that a hearing be ordered.

“ September 16, 1904, (I. T. D. 7234-1904), the Department reopened said case and referring to the fact, as shown by the records of this office, that deeds Nos. 9450 and 9451 covering the

allotment selection made to said Barney Thlocco, deceased, have been issued (which said deeds were transmitted to the Principal Chief of the Creek Nation for delivery, on February 11, 1903), stated that,

“ *‘The Department does not believe that the question as to whether or not deeds have been issued to the deceased or his heirs should be considered in connection with the motion for rehearing, in as much as deeds to land constitute only a portion of the benefits incidental to Creek citizenship. If the name of the deceased appears on the roll erroneously, the error should be corrected.’*

“ July 24, 1905, this office received a communication from the Attorney for the Creek Nation withdrawing all motions to reopen Creek enrollment cases filed by him prior to the meeting of the Creek Council in October, 1904.

“ October 2, 1905, a report was transmitted to the Department in the matter of the right to enrollment of Aaron McGirt, deceased, and it was recommended in said matter that in view of the facts in the case and of the action of the attorney for the Creek Nation in withdrawing his motion to reopen same, that the enrollment of said Aaron McGirt, deceased, be allowed to stand.

“ The Department under date of November 3, 1905, (I. T. D. 14250-1905), directed that investigation be had as to the right to enrollment

of said Aaron McGirt, deceased, stating that 'It is not necessary for the Creek Nation to supply funds to investigate this matter. You are authorized to see that correct rolls of Creek citizens are made and have been furnished with the means necessary for that purpose.'

" *In accordance with instructions as above set forth, an attempt was made to locate the heirs of said Barney Thlocco, deceased, by letter and through a Creek enrollment field party, but the effort in this direction was unsuccessful.*

" Wilson Knight and Barney Yahola, upon whose affidavit said case was reopened, having died, the testimony of other witnesses was taken in this matter by the Creek field party on October 21 and November 14, 1905, neither the Creek Nation nor the heirs of said deceased being represented at said hearings.

" *A hearing in this matter was set for February 19, 1906. No testimony or other evidence was introduced on said date.*

" I am of the opinion that the testimony introduced in the later proceedings, considered in connection with the affidavit of Wilson Knight and Barney Yahola, previously submitted, conclusively establishes the date of death of Barney Thlocco as prior to April 1, 1899, and respectfully recommend that authority be granted for the striking of the name of said applicant from the approved roll of citizens by blood of the Creek Nation opposite No. 8592.

“ The complete record in the case is transmitted herewith.

“ Respectfully,

“ (Signed) TAMS BIXBY,
(Italics ours.) *Commissioner.*”

The *intention* and *scope* of the Secretary's final order in the matter appear in his letter dated December 13, 1906, record page 60, which is as follows:

“ Department of the Interior.

“ Washington, December 13, 1906.

“ *Commissioner to the Five Civilized Tribes,
Muskogee, Indian Territory.*

“ *Sir:* October, 10, 1906, you transmitted a report in reference to the right of Barney Thlocco, deceased, whose name is contained in a partial list of citizens by blood of the Creek Nation, opposite No. 8592, to enrollment as a citizen of said nation.

“ By reason of an investigation held by you, you consider that said Barney Thlocco died prior to April 1, 1899, and you therefore recommend that authority be granted for the striking of the name of said applicant from the approved roll of citizens by blood of the Creek Nation.

“ Reporting November 12, 1906 (Land 95459), the Indian Office concurs in your recommendation.

“ The Department has this day canceled the name of Barney Thlocco, opposite No. 8592, from the partial list of citizens by blood of the Creek Nation, and has requested the Indian Office to take similar action on the roll in its possession.

“ You are hereby authorized to cancel said name from the roll in your custody. *It appearing that deeds Nos. 9450 and 9451, covering the allotment selection made to said Barney Thlocco, deceased, have been issued and delivered heretofore, the Attorney General has this day been requested to take such action as he may deem proper looking to the setting aside of said instruments.*

“ Respectfully,

“ (Signed) E. A. HITCHCOCK,
(Italics ours.) *Secretary.*”

From the foregoing the following important facts appear: *That this proceeding was ex parte and wholly without notice to the heirs; that there was no hearing or trial; that the officers of the department recognized that they could not make an order affecting the allotment or the certificate there-to or the patents; that the most the department undertook to do was merely to strike off the name of Barney Thlocco from the final rolls so that his heirs might not participate in future distribution of tribal*

funds, and to refer the entire matter of the allotment certificate, the patents and the land to the Department of Justice for proper court action. The Secretary correctly held that the patent had been issued and had been delivered and therefore he had no jurisdiction to make an order affecting the title.

The case of *Garfield v. United States ex rel Goldsby*, 211 U. S. 249, 53 L. ed. 168, is altogether conclusive of the proposition that the attempted cancellation of Thlocco's enrollment was wholly unauthorized by law, without due process of law and utterly void for any purpose. Goldsby had been enrolled and had received an allotment certificate. The Secretary of the Interior received information, just as here, which convinced him that the enrollment was illegal. He struck the name of Goldsby from the final rolls without notice or a hearing, just as in this case. An application was made for mandamus to require the Secretary to restore his name to the rolls. The answer of the Secretary denied the right of Goldsby to enrollment. The case went off on demurrer to the answer. The high points of the court's opinion are these: *Goldsby acquired valuable rights by his enrollment; his allotment certificate was the conclusive evidence of his right to the land. The statutes gave the Secretary no power or authority, without notice and hearing, to strike down the rights thus ac-*

quired. His action was wholly unwarranted and void.
The court's opinion, in part, is as follows:

“ It is insisted by the learned counsel for the government that the court had no jurisdiction to entertain this suit, because the legal title has not as yet passed from the government, as no patent has passed. We have no disposition to question those cases in which this court has held that the courts may not interfere with the Land Department in the administration of the public lands while the same are subject to disposition under Acts of Congress intrusting such matters to that branch of the government. Some of these cases are cited in the late case of *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 50 L. ed. 499, 26 Sup. Ct. Rep. 282, and the principle to be gathered from them is that while the land is under the control of the Land Department prior to the issue of patent, the court will not interfere with such departmental administration. This was held as late as the case of *Love v. Flahive*, 205 U. S. 195-198, 51 L. ed. 768-770, 27 Sup. Ct. Rep. 486.

“ But the question presented for adjudication here does not involve the control of any matter committed to the Land Department for investigation and determination. The contention of the relator is, that as the Secretary had exercised the authority conferred upon him and placed his name upon the rolls, and the same had been certified to the Commission, and he had received an allotment certificate, and was in pos-

session of the lands, the action of the Secretary in striking him from the roll was wholly unwarranted, and not within the authority and control over public land titles given to the Interior Department.

“ By the conceded action of the Secretary prior to the striking of Goldsby's name from the rolls, he had not only become entitled to participate in the distribution of the funds of the nation, but, by the express terms of section 23 of the Act of July 1, 1902 (32 Stat. at L. 641, Chap. 1362), it was provided that the certificate should be conclusive evidence of the right of the allottee to the tract of land described therein. We have therefore under consideration in this case the right to control by judicial action an alleged unauthorized act of the Secretary of the Interior for which he was given no authority under any Act of Congress.

“ It is insisted that mandamus is not the proper remedy in cases such as the one now under consideration. But we are of opinion that mandamus may issue if the Secretary of the Interior has acted wholly without authority of law. Since *Marbury v. Madison*, 1 Cranch. 137, 2 L. ed. 60, it has been held that there is a distinction between those acts which require the exercise of discretion or judgment and those which are purely ministerial, or are undertaken entirely without authority, which may become the subject of review in the courts. The subject was under consideration in *Noble v. Union River Logging Co.*, 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271,

and Mr. Justice BROWN, delivering the opinion of the court, cites many of the previous cases of this court, and, speaking for the court, says:

“ ‘We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the head of a department, under any view that could be taken of the facts that were laid before him, was *ultra vires*, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do. As observed by Mr. Justice BRADLEY, in *Board of Liquidation v. McComb*, 92 U. S. 531, 541, 25 L. ed. 623, 628: “But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other”.’

“ We think this principle applicable to this case, and that there was jurisdiction to issue the writ of mandamus.

“ In our view, this case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the acts of Congress. We appreciate fully the purpose of Congress in numerous acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this court have shown its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law. But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and, if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action.

“ In the extended discussion which has been had upon the meaning and extent of constitutional protection against action without due process of law, it has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard.

“ The right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to

say that its binding obligation has never been questioned in this court.

“ The acts of Congress, as we have seen, have made provision that the commission shall certify from time to time to the Secretary of the Interior the lists upon which the names of persons found by the commission to be entitled to enrollment shall be placed. Upon the approval of the Secretary of the Interior these lists constitute a part and parcel of the final rolls of citizens of the Choctaw and Chickasaw tribes and Chickasaw freedmen, upon which allotments of lands and distribution of tribal property shall be made.

“ The statute provides in section 30, Act of July 1, 1902, *supra*:

“ ‘Lists shall be made up and forwarded when contests of whatever character shall have been determined, and when there shall have been submitted to and approved by the Secretary of the Interior lists embracing names of all those lawfully entitled to enrollment, the rolls shall be deemed complete. The rolls so prepared shall be made in quintuplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Choctaw Nation, one with the governor of the Chickasaw Nation, and one to remain with the Commission to the Five Civilized Tribes.’

“ The Secretary took the action contemplated by this section and acted upon the list forwarded by the commission. The roll was made up and distributed in quintuplicate, as required by the statute. Notice was given to the Commission, and land was allotted to the relator, as provided by section 23 of the act of July 1, 1902, *supra*. The relator thereby acquired valuable rights, his name was upon the rolls, the certificate of his allotment of land was awarded to him. There is nothing in the statutes, as we read them, which gave the Secretary power and authority, without notice and hearing, to strike down the rights thus acquired.

“ Nor do we think it an answer to the petition for a writ of mandamus to say, as is earnestly contended by the counsel for the government, that *Goldsby's* case comes within the provisions of the act of July 1, 1902, establishing a citizenship court, as it appears in this record that he was one of the claimants whose judgment in the court of the Indian Territory was annulled by the subsequent procedure in the citizenship court, leaving to Goldsby the remedy of appealing himself to that court, which, having failed to do, he has lost all right to enrollment, and therefore the decision of the Secretary of March 4, 1907, striking him from the rolls, ought not to be interfered with, for the reason that the writ of mandamus, upon well-settled principles, ought not to issue to require the Secretary to do that which it now appears he never had any lawful authority to do. But we are of opinion that

the facts now adduced are insufficient to require us to say that Goldsby could not establish a right to enrollment. The government contends, and we have held, that it does not appear in this case whether Goldsby's name was on the original or other tribal rolls—a fact essential to be known in order to determine whether his contention be sound that such an enrollment gave him the right to participate in the division of the funds and lands of the nation, irrespective of the action of the Dawes Commission, the court of the Indian Territory, or the citizenship court. The question here involved concerns the right and authority of the Secretary of the Interior to take the action of March 4, 1907, in summarily striking the relator's name from the rolls. That is the question involved in this case.

“ For the reasons given we think this action was unwarranted, and that the relator is entitled to be restored to the status he occupied before that order was made.”

The later case of *United States ex rel Turner v. Fisher*, 222 U. S. 204, 56 L. ed. 165, does not in any manner impair the force of the *Goldsby* case. Turner's admissions upon the pleadings for the writ of mandamus to restore his name upon the rolls admitted that he had no right to be enrolled. It, therefore, followed that since the petitioner himself admitted that he had no right to be enrolled he could not be heard in a court of equity in an application

for a writ to restore his name. If he had not made this admission, but had asserted his right to be enrolled and had relied upon the enrollment record, as was done in the *Goldsby* case, he would have prevailed in the action.

The case of *United States ex rel Lowe v. Fisher*, 223 U. S. 95, 56 L. ed. 364 was an action for mandamus to require the Secretary to cancel his action striking the names of certain Cherokee freedmen from the approved rolls. *He had stricken their names after notice and a full hearing.* The prayer of the petition was denied on the ground that a hearing had been had. This left the petitioners in a situation where they could not participate in further distribution of the tribal funds without establishing their right thereto in an appropriate action. The Secretary's action left the allottees without patents to their lands, and possibly put upon them the burden, in an action for the patents, to show their right thereto. We are of the opinion, however, that land having been segregated from the public domain of the nation, the government could not cancel the allotment certificate except by a court action for that purpose. But that point is not here involved.

The case of *Guaranty Savings Bank v. Bladow*, 176 U. S. 448, 44 L. ed. 540, does not sustain the government or the views of counsel for Bissett and

others. It involved a homestead entry. There was a *contest* proceeding in which a mortgagee of the entryman's interest did not have notice. It was held that the cancellation of the entryman's certificate put upon the mortgagee the burden of showing that the entryman mortgagor had the right to the land. The land office has always required *notice to the entryman and a hearing before cancellation of his certificate of entry*. The rules so provide, and this court will take notice of such rules. *But the rules do not require notice to be served upon the entryman's grantee* who takes his conveyance charged with notice of whatever imperfections there may be in the title. The grantee takes his conveyance from the entryman, knowing that the departmental rules do not require notice to him of a contest. Cancellation of the entryman's certificate without notice to him or to his heirs, is, of course, absolutely void, and the authorities so hold. The entryman's certificate differs substantially from the allotment certificate. It is *prima facie* evidence only of his right to the title, as we have shown heretofore in this brief, while the allotment certificate is *conclusive* evidence of the allottee's right to the land.

In *Peyton v. Desmond*, 129 Fed. 1, 9, the Circuit Court of Appeals for the Eighth Circuit, by Judge VAN DEVANTER, now Mr. Justice VAN DEVANTER, said:

“ The power of the Land Department to review its prior rulings and to cancel existing entries is not unlimited or arbitrary (*Cornelius v. Kessel*, 128 U. S. 456, 9 Sup. Ct. 122, 32 L. ed. 482), and can be exercised only after notice to parties in interest and due opportunity for a full hearing.”

In *Noble v. Union River Logging Co.*, 147 U. S. 165, 37 L. ed. 123, 127, this court said, with reference to an attempt of the Land Department to cancel a reservation for the benefit of the railroad:

“ A revocation of the approval of the Secretary of the Interior, however, by his successor in office was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void. As was said by Mr. Justice GRIER, in *United States v. Stone*, 69 U. S., 2 Wall. 525, 535, 17 L. ed. 765, 767: ‘One officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of the court’.”

The case of *Cornelius v. Kessel*, 128 U. S. 456, 32 L. ed. 482, holds that such action by the Land Department of the government without notice is void.

Assuming, for the purposes of argument, that the Secretary was not theretofore divested of power to affect this allotment or the evidence of the defendant's title, his action was in violation of the de-

fendants' constitutional rights and wholly void for want of notice and hearing. Therefore, as the case stands, patents having been issued and delivered, the government must impeach the evidence, if at all, in the regular way.

The utmost claimed upon behalf of Bissett and associates on account of the attempted cancellation of the enrollment is that the action of the Secretary shifted the burden of proof, placing upon the heirs of Thlocco in this case the burden of showing Thlocco's right to enrollment. This contention by the government is plainly at war with the decision of this court in the *Goldsby* case, *supra*, for under that opinion the action of the Secretary was illegal, without process of law, and wholly unauthorized, justifying the court in issuing the writ of mandamus requiring the Secretary to restore the name without placing upon the petitioner the burden of showing his right to be enrolled. Thlocco's heirs, therefore, have the right, without assuming the burden of showing Thlocco's right to enrollment, to require the Secretary in an action for that purpose to restore the name of Thlocco to the rolls. The doctrine of the *Goldsby* case is that the enrolled citizen did not lose any rights by the unauthorized striking of the name from the rolls. As was held in the *Goldsby* case, the enrollment confers upon the citizen a valuable right

for it is one of the muniments of his title, just as the allotment certificate is the conclusive evidence of his title. The enrollment and issuance of the allotment certificate constitute evidence of title arising almost to the dignity and conclusiveness of the patent itself.

PROPOSITION THREE.

THE CERTIFICATE OF ALLOTMENT AND DEEDS TO THLOCCO WERE NOT NULL AND VOID BECAUSE HE WAS DEAD AT THE TIME THEY WERE MADE. THIS PROPOSITION IS NOT CONTESTED BY THE GOVERNMENT.

The government does not insist that the certificate of allotment and deeds to Thlocco were null and void because he was dead at the time they were made, but counsel for Bissett, Toxaway Oil Company, Moore and Cosden, claiming through Posey, who attempted to file on part of the land May 19, 1913, do not join the government in conceding this point.

We shall discuss the question, Were the certificate of allotment and deeds to Thlocco null and void

because he was dead at the time they were made under the following heads in the order named:

A. The fact that Thlocco died prior to June 30 1902, the date when the allotment was made in his name, is immaterial.

- (1) The provision at Section 28, Original Creek Agreement, "If any citizen has died * * * before receiving his allotment of lands and distributive share of all the funds of the tribe, *the lands and money to which he would be entitled if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly,*" is of *substance*, not mere form; the heirs taking the lands as if by *descent and as of the date of Thlocco's death and as if he had been vested with full title.*
- (2) The land did not pass by *grant*; it was received in partition or allotment, and therefore the rules governing an ordinary grant do not apply.
- (3) The Commission was required by *mandatory* acts of Congress to make *arbitrary* allotments in cases where the enrolled members did not select for themselves within a reasonable time (the privilege of selection not being accorded to the heirs). Acceptance of allotment certificate

and patents was not necessary to pass title. According to departmental practice and construction of the statutes involved, not only did the Commission have the right to make arbitrary allotments but the certificate of allotment and patent in the name of the dead allottee are valid.

- (4) This case is not analogous to an action involving patent issued to a fictitious person. The authorities cited involving patents to fictitious persons examined and found to be not in point.

B. The allotment certificate was final and *conclusive* evidence of the complete equitable title conferred upon the heirs of Thlocco by the Original Creek Agreement. The certificate, like a patent, dual in its effect, was an adjudication of the special tribunal empowered to decide the question, was Thlocco entitled to the land and was a *conveyance* of the right to full legal title.

C. Title by patent from the United States and the Creek Nation is title by *record*; and delivery of the instrument to the grantee is not essential to pass the title; therefore, when the patent was recorded upon the public records on the 11th day of April, 1903, the legal title of the land passed.

D. The Act of May 20, 1836, 5 Stat. 31, providing "that in all cases where patents for public land have been or may hereafter be issued in pursuance of any law of the United States, to a person who has died or who shall hereafter die, before the date of such patent the title to the land designated therein shall inure to, and become vested in, the heirs, devisees or assigns of such deceased patentee as if the patent had issued to the deceased person during his life," is applicable to the patents here involved.

E. Assuming that legal title had not theretofore passed, it did pass by section 5, Act of April 26, 1906, 34 Stat. 137. This land was not "involved in contest" on April 26, 1906.

F. Assuming that the legal title had not theretofore passed, it did vest in the heirs by Section 3 of the Act of June 25, 1910, 36 Stat. 863.

G. If patent to Thlocco did not pass title to his heirs as a matter of law the right thereto is equivalent to the patent and equity will do that which ought to have been done, and will decree title to the heirs.

A.

The fact that Thlocco died prior to June 30, 1902, the date when the allotment was made in his name, is immaterial.

- (1) *The provision at section 28, Original Agreement, "If any citizen has died * * * before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall DESCEND to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly," is of SUBSTANCE, not mere form, the heirs taking the lands as if by DESCENT AND AS OF THE DATE OF THLOCCO'S DEATH AND AS IF HE HAD BEEN VESTED WITH FULL TITLE.*

—Section 28, Act March 1, 1901, 31 Stat. 861;
Shulthis v. McDougal, 170 Fed. 529;
McDougal v. McKay, 237 U. S. 372, 59 Law
ed. 1001;
Mullen v. United States, 224 U. S. 448, 56
Law ed. 834;
Skelton v. Dill, 235 U. S. 206, 59 L. ed. 198;
Woodward v. deGraffenreid, 238 U. S. 284,
317-319, 59 L. ed. 1311, 1328;
Wallace v. Adams, 74 C. C. A. 540, 143 Fed.
716, 721;

Doe v. Wilson, 64 U. S. 457, 16 L. ed. 584;

Crews v. Burcham, 66 U. S. 352, 17 L. ed.

91;

Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49;

Folk v. United States, 233 Fed. 180;

Gould v. West, 32 Tex. Rep. 339, 350;

Section 20, Act July 1, 1902, 32 Stat. 716

Section 22, Act July 1, 1902, 32 Stat. 641.

Commencing with the Act of March 3, 1893 Chap. 209, 27 Stat. at L. 612, 645, Congress passed many laws with the view of breaking up the tribal relations in the Five Civilized Tribes, namely, the Creek, Seminole, Cherokee, Choctaw and Chickasaw Nations, and for the final partition and distribution of the lands and moneys of the respective tribes.

The history of this legislation in so far as it affects the Creek Nation is set forth at length in *Woodward v. deGraffenried*, 238 U. S. 282, 294, 59 L. ed. 1310, 1318. Tribal government was a failure. Many white people from the various states of the union had made their homes in these nations. Everybody concerned, the officers of the government, the white population and the Indians themselves, planned for and expected that the public domain of the respective tribes would be allotted to the respective members of the tribes; that the Indians would take on speedily all the habits and customs of their white neigh-

bors, and that statehood would be granted. At first Congress entertained some doubt both as to its right to exercise plenary power without the consent of the Indians and of the expediency of such division of the tribal property without the consent of the Indians. But by a series of authoritative decisions, it was established that Congress had the plenary power to break up the tribal relations, enroll the members of the tribe, allot the lands and distribute the moneys, giving to each enrolled member of the tribe his *pro rata* part without the consent of the Indians either in their tribal or individual capacities; and Congress continued from year to year to exercise in larger degree so much of its plenary power as was necessary to further its general scheme of allotment. Where persuasion proved ineffectual, arbitrary action was taken, always upon the theory, however, in the Creek Nation, as in the other tribes, that the Creek tribe owned the lands subject, of course, to the ultimate title in the government, (which ultimate title may be disregarded in this discussion for the reason that there was never any abandonment of the tribal lands but an allotment of the same) and always upon the theory that each enrolled member of the tribe was entitled to the same amount of land in value and money as any other member of the tribe. The names on the rolls were to be the *units* for the *final partition and distribution of all the tribal property*.

Every member of the Creek tribe found by the Commission to the Five Civilized Tribes to have been alive April 1, 1899, was entitled to receive an allotment. If dead the allottee's lands and money were to descend to his heirs. Section 28 of the Original Creek Agreement, Act of March 1, 1901, provides:

“ No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.

“ All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled ‘An Act for the protection of the people of the Indian Territory, and for other purposes,’ shall be placed upon the rolls to be made by said commission under said Act of Congress, *and if any such citizen has died* since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, *shall descend to his heirs* according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

“ All children born to citizens so entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be

placed on the rolls made by said commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

“ The rolls so made by said commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made and to no other persons.”

In case any enrolled member of the tribe died before receiving his distributive portion of the lands and moneys of the tribe, by said Section 28 the situation was made precisely the same as if the deceased member had lived to take his allotment. Congress was not legislating at Section 28 about the *mere form of allotment certificates or patents*. The words “shall descend” must be construed with the words “and be allotted.” We do not claim that there was descent in a technical sense, but the rights of the heirs in all respects were the same as if Thlocco had been *vested* with the legal title. *The allotment upon behalf of the deceased member made in his name was a substantial compliance with Section 28.* The contention upon behalf of Bissett and others that the certificate of allotment and patent were ineffectual

because in the name of Thlocco ignores entirely the force of the words "*the lands * * * shall descend to his heirs.*" In *Shulthis v. McDougal*, 170 Fed. 529, the Circuit Court of Appeals for the Eighth Circuit said on this point:

" These kinsmen got all their right to additional lands under and through the enrolled member who had died. Whether the ancestor was actually seised of the property or not in his lifetime, was immaterial. It was the intent of the statute that the property should pass by the same right and in the same manner that it would have passed if the person enrolled had survived to receive his allotment. The tribe was not bestowing said land as a bounty, but was simply providing for the right of inheritance.

" Congress itself has construed this statute. Section 5 of the act (Act April 26, 1906, c. 1876, 34 Stat. 138) provides:

" 'That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued, shall issue in the name of the allottee; and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs; and in case any allottee shall die after the restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had is-

sued to the allottee during his life; and all patents heretofore issued where the allottee died before the same became effective, shall be given like effect.'

" Here is an express declaration by Congress that the land shall descend to heirs the same as it would have descended if the patent or deed had issued to the allottee during his life, and it is declared that allotments for allottees who have died shall also thus descend. This interpretation by Congress of its own act leaves no room for doubt as to its intent."

The doctrine of the *Shulthis* case was fully approved by this court in *McDougal v. McKay*, 237 U. S. 372, 59 L. ed. 1001.

The general scheme of allotment was the same in the Five Civilized Tribes. In the Cherokee, Choctaw and Chickasaw tribes the basis of the enrollment was the same, but it was expressly provided that allotments upon behalf of deceased members of the tribes should be made in their names and that patents should issue; while in the Seminole and Creek Nations the form in which the certificates and patents should issue was not expressly provided. Allotments upon behalf of deceased members by the general scheme of allotment were made in substantially the same manner in all the tribes.

—Cherokee Treaty of July 1, 1902, Act of July 1, 1902, 32 Stat. 716, Section 20;

Choctaw-Chickasaw Treaty, Act of July 1,
1902, 32 Stat. 631, Section 22;

Seminole Treaty of June 2, 1900, 31 Stat.
250, Section 2.

Whether the allotment was made in the name of the deceased member of the tribe or directly to his heirs, it was, in every case, the allotment of the deceased member and his heirs received it as if by descent and not otherwise, and in all cases as of the date of the death of their ancestor.

The case of *Mullen v. United States*, 224 U. S. 448, 56 L. ed. 834, is conclusive upon this point, for it was held in this case that there is no *substantial* but only a *formal* distinction between the case of an allotment for the benefit of a deceased member made in the name of the deceased and such an allotment made to the heirs. The court said, in the opinion by Mr. Justice HUGHES:

“ The question now presented—with regard to the conveyances made to the appellants—arises in the second class of cases; that is, where a person whose name appeared upon the rolls died after the ratification of the agreement and before receiving his allotment. In this event, provision was made for allotment in the name of the deceased person, and for the descent of the lands to his heirs. This is contained in paragraph 22 of the Supplemental Agreement:

“ ‘22. If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution, as provided in chapter forty-nine of Mansfield’s Digest of the Statutes of Arkansas: *Provided*, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted.’

“ In the cases falling within this paragraph, there is no requirement for the selection of any portion of the allotted lands as a homestead, and there is no ground for supposing that it was the intention of Congress that a provision of such selection should be read into the paragraph, so as to assimilate it to paragraph 12, relating to allotments to living members. While the lands were to be allotted in the name of the deceased allottee, they passed at once to his heirs, and as each heir, if a member of the tribe, was already

supplied with his homestead of 160 acres, there was no occasion for a further selection for that purpose from the inherited lands. No distinction is made between the heirs; they might or might not be members of the tribe; and where there were a number of heirs, each would take his undivided share. It is quite evident that there is no basis for implying the requirement that in such case there should be a selection of a portion of the allotment as a homestead, and all the lands allotted under paragraph 22 are plainly upon the same footing. While it appears from the record that, in the present case, separate certificates of allotment were issued for homestead and surplus lands, this was without the sanction of the statute.

“ In the agreement with the Creek Indians (Act March 1, 1901, 31 Stat. at L. 861, 870, Chap. 676), it was provided that in the case of the death of a citizen of the tribe after his name had been placed upon the tribal roll made by the Commission, and before receiving his allotment, the lands and money to which he would have been entitled, if living, should descend to his heirs, ‘and be allotted and distributed to them accordingly.’ The question arose whether, in such cases, there should be a designation of a portion of the allotment as a homestead. In an opinion under date of March 16, 1903, the then Assistant Attorney General for the Interior Department (Mr. Van Devanter) advised the Secretary of the Interior that this was not required by the statute. He said: ‘After a careful consideration of

the provisions of law pertinent to the question presented, and of the views of the Commissioner of Indian Affairs and the Commission to the Five Civilized Tribes, I agree with the latter that in all cases where allotment is made directly to an enrolled citizen, it is necessary that a homestead be selected therefrom and conveyed to him by separate deed; but that where the allotment is made directly to the heirs of a deceased citizen, there is no reason or necessity for designating a homestead out of such lands, or of giving the heirs a separate deed for any portion of the allotment, and therefore advise the adoption of that rule.' It is true that under the Creek Agreement, in cases where the ancestor died before allotment, the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw Agreement the allotment was to be made in the *name* of the deceased member, and 'descend to his heirs.' This, however, is a merely formal distinction and implies no difference in substance. In both cases the lands were to go immediately to the heirs, and the mere circumstance that, under the language of the statute, the allotment was to be made in the name of the deceased ancestor instead of the names of the heirs furnishes no reason for implying a requirement that there should be a designation of a portion of the lands as homestead."

The following excerpt from the *Mullen* case is squarely in point:

“ It is true that under the Creek agreement, in cases where the ancestor died before allotment, the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw agreement the allotment was to be made in the name of the deceased member and ‘descend to his heirs.’ *This, however, is a mere formal distinction and implies no difference in substance.*” (Italics ours.)

Continuing to the same point the court said that it was a *mere circumstance* that in the Choctaw and Chickasaw Nations the lands should be allotted in the name of the deceased member, while in the Creek Nation allotment should be made directly to the heirs. *The government, for the benefit of the Creek Nation, cannot cut off from the heirs of Thlocco the right of inheritance merely for this difference of circumstance. To do this would be to defeat the intention of Congress whereby the heirs were to take by descent.* A mere formal defect in the certificate of allotment or patent cannot divest the heirs of the estate of their ancestor which descended to them by operation of law. The theory of Bissett and his associates on this point is inconsistent with the general scheme of allotment whereby every Creek living April 1, 1899, was to get his allotment. The death of Thlocco prior to the issuance of the certificate was an *extrinsic fact* not in any manner affecting his

right to be one of the *units* for the final partition of the land. The inheritance of the heirs was in no manner impaired by mere formal irregularity not occasioned, as we shall show later, by any default upon their part, but arising in a matter where the government upon behalf of the Creek Nation had to discharge a sacred duty to all the members of the tribe, including these heirs, which duty included, as we shall show, not only the selection of the land for the benefit of the heirs, but the issuance of the certificate and the patent without any application or effort whatsoever upon the part of the heirs. To sum up on this point, *the dissolution of the tribe was had as of April 1, 1899. Every member of the tribe took his right to an allotment as of that date by a fiction of law.* If any member died before actually receiving his land, nevertheless his allotment was considered as having been carved out from the public domain as of that date and cast upon the heirs as of that date by descent. Since the entire transaction, extending through years, was done as of April 1, 1899, when Thlocco was alive, it is wholly immaterial whether the evidence of the heirs' inherited rights was issued in their name or in the name of their ancestor. There are no more lands to allot in the Creek Nation. For the government to prevail would be to take from the heirs the lands which descended to them without the possibility of their receiving any other.

In *Skelton v. Dill*, 235 U. S. 206, 59 L. ed. 198, a Creek allotment was involved. This court said, in opinion by Mr. Justice VAN DEVANTER:

“ The facts out of which the question arises are these: Archie Hamby was born in February, 1900, and died in July, 1901, being survived by his parents and by at least one sister. His mother was a Creek woman, duly enrolled as such in 1895, and his father was a white man, not entitled to enrollment. Two or three years after the child's death his name was regularly placed upon the roll of Creek citizens by the Commission to the Five Civilized Tribes, and the lands in question were duly embraced in an allotment made on his behalf. *A deed for them was also issued in his name, and this, by operation of law, vested the title in his heirs.*” (Italics ours.)

The Arch Hamby allotment was made under act of March 1, 1901, 31 Stat. 861, as modified and supplemented by the Act of June 30, 1902, 32 Stat. 500, which provided for the enrollment of certain children born after April 1, 1899. Provision similar to that of Section 28, *supra*, was made for allotments upon behalf of such deceased children. The declaration of this court “A deed for them (the heirs) was also issued in his name and this by operation of law vested the title in his heirs,” is grounded upon the proposition that the heirs took by descent or as if by descent, by operation of the statutes.

In *Woodward v. deGraffenried*, 238 U. S. 284, 59 L. ed. 1310, there was involved a "Curtis Bill" allotment by which the allottees, prior to the Original Creek Agreement, took merely the surface right of the land. The allottee had died before the Original Creek Agreement. All such "Curtis Bill" allotments were confirmed by Section 6 of the Original Creek Agreement, which provides:

" All allotments made to Creek citizens by said commission prior to the ratification of this agreement, as to which there is no contest, and which do not include public property, and are not herein otherwise affected, are confirmed, and the same shall, as to appraisement and all things else, be governed by the provisions of this agreement; and said commission shall continue the work of allotment of Creek lands to citizens of the tribe as heretofore, conforming to provisions herein; and all controversies arising between citizens as to their right to select certain tracts of land shall be determined by said commission."

The Supreme Court held:

" In our opinion the equitable title to the Agnes Hawes allotment was vested in her heirs according to Creek law by the clear meaning of Section 28."

And again to the same point:

" The result was to vest a complete equit-

able title in her 'heirs,' to be determined according to the Creek laws of descent and distribution; and, upon familiar principles, their interest, being vested, was not divested by the subsequent adoption of the act of May 27, 1902."

And further:

" It is perhaps unnecessary to say that the subsequent issue of a patent to the 'heirs of Agnes Hawes,' without naming them, conveyed the legal title to those persons upon whom the equitable title was conferred by the Original Agreement."

To say in a case like that of Thlocco that the heirs took by descent is to announce in different words the proposition that the heirs took a complete equitable title as if at the death of Thlocco by operation of law without any allotment certificate or patent. This inherited right of the heirs was in the nature of a *float* until the survey and designation of a particular 160 acres of land by the Commission as the Barney Thlocco allotment, but at that moment, without the issuance of an allotment certificate, the *mere selection and survey separated the inheritance of these particular heirs from that of all others similarly situated and was a final designation of the particular estate which descended upon them in the right of their ancestor, and their right thereto was*

indefeasible regardless of what the government might or might not do thereafter.

In *Folk v. United States*, 233 Fed. 177, there was involved a Creek allotment made in the name of Thomas Atkins. The bill by the government was upon the theory that Thomas Atkins was not alive upon April 1, 1899. The United States contended that the allotment certificate and patent in the name of Thomas Atkins was void. The Circuit Court of Appeals for the Eighth Circuit determined the case against the United States upon the ground that the government had not impeached successfully the judgment of the Commission to the Five Civilized Tribes enrolling Thomas Atkins, holding, in effect, that the certificate and patent in the name of Thomas Atkins, though dead, operated to pass the title to his heirs.

In the *Mullen* case, *supra*, in discussing the effect of the allotment certificate, the court cited several cases very instructive upon the point involved here, using this language:

“ There was undoubtedly a complete equitable interest which, in the absence of restriction, the owner could convey. *Doe ex dem. Mann v. Wilson*, 23 How. 457, 16 L. ed. 584; *Crews v. Burcham*, 1 Black., 352, 17 L. ed. 91; *Jones v. Meehan*, 175 U. S. 1, 15-18, 44 L. ed. 49, 55, 57, 20 Sup. Ct. Rep. 1.”

In *Doe v. Wilson*, cited in the *Mullen* case, *supra*, there was involved lands allotted to a Pottawatomie Indian. It was held that the reservees took by the treaty directly and that the law itself converted the reserved section into individual property and that the subsequent survey, selection of the land and issuance of patent operated to pass legal title to the heirs as though they had taken the same during their ancestor's life; that is to say, the heirs took the land by operation of law though it was definitely located after the death of their ancestor. The case of *Crews v. Burcham*, cited in the *Mullen* case, *supra*, is squarely in point. Here was involved land of the Pottawatomie tribe of Indians as in the *Doe-Wilson* case, *supra*. It was held that the reservation created by law an equitable interest in the land to be selected under the treaty, and that though the survey and selection were made after the death of a reservee and the patent was made in the name of the deceased man, it operated under the law to pass the legal title to the heirs. The court invoked the act of May 20, 1836, 5 Stat. 31, which provides: "That in all cases where patents for public lands have been or may hereafter be issued in pursuance of any law of the United States to a person who had died or who shall hereafter die before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs and devisees or assigns of

such deceased patentee as if the patent had issued to the deceased person during life," and applied the same to an *Indian allotment*. By reference to *Doe v. Wilson, supra*, it is clear that the Pottawatomie title was substantially the same in every way as the Creek title, that is to say, the members of the tribe had the perpetual right to the use of the land with the ultimate title in the government. It is contended by counsel for Bissett that the beneficial right conferred by law upon the heirs must fail because Thlocco had not received his allotment and that the same was never allotted to the heirs as such. But in *Crews v. Burcham*, where the situation was substantially the same as here, this court held that the heirs took the complete equitable title by *descent* and that the subsequent selection, designation and segregation of the reservation from the public domain of the tribe as and for the land of the ancestor inured to the benefit of the heirs, and that so far as the legal title was concerned, it passed under the said act of May 20, 1836, which Act, having been applied under similar circumstances to a Pottawatomie allotment, should be applied to a Creek allotment if such application should appear necessary to preserve in the heirs the rights intended by Congress to be conferred upon them through their ancestor. We shall discuss this statute more fully in paragraph D under this same head.

There is obvious propriety in the fulfillment by the government of its undertakings towards these wards of the nation. Surely the defendants who claim through a pretended subsequent allotment should not be heard to say that though Barney Thloeco was alive April 1, 1899, and was entitled to an allotment, which right descended upon his heirs, and though it was the duty of the Commission to the Five Civilized Tribes to set aside such allotment to the heirs in virtue of the beneficial right which they had taken by inheritance, that the scheme for allotment must break down and fail to protect the heirs on account of the default of the representatives of the government. To seek such a technical advantage over these dependent people to whom the government owes such a sacred obligation is not consistent, we respectfully submit, with the generous policy of the United States in dealing with the members of these Indian tribes. The plain propriety in a fulfillment by the government of its undertakings in a matter of this sort is discussed in *McArthur's Heirs v. Dun's Heirs*, 7 How. 263, 12 L. ed. 693, 696, where it was said:

“ There is an obvious propriety in a fulfillment of its undertakings by the government, and in its forbearance to enforce a forfeiture founded on no delinquency in those who would be affected thereby. * * * ‘The death of the

grantee is an extrinsic fact, not impairing the equity of the claim as against the government'."

In *Gould v. West*, 32 Tex, 339, 350, in discussing a similar matter, the Supreme Court said, referring to the undertakings incumbent upon the officers of the Land Department:

" These were public official acts, which committed the government to the fulfillment of its sacred pledge, and which the government had provided in the act itself might be judicially enforced against its ministerial agents. This constituted the *legal tie*, the *obligation* of the government, and the *right* of the citizen."

(2) *The land did not pass by GRANT; it was received in PARTITION or allotment, and therefore, the rules governing an ordinary grant do not apply.*

—Section 3, Act March 1, 1901, 31 Stat. 861;
Shulthis v. McDougal, 170 Fed. 529;
Skelton v. Dill, 235 U. S. 206, 59 L. ed. 198;
McDougal v. McKay, 237 U. S. 372, 59 L. ed. 1001.

Section 3, Act March 1, 1901, and other acts of Congress provide, in effect, that each enrolled member of the tribe shall receive his *pro rata* part in value of the lands and an equal part of the tribal monies, that is to say, there should be a partition, divis-

ion and distribution of the property. Enrolled members of the tribe *did not receive their right to allotments under the statutes but by reason of their membership in the tribe.* Allotment certificates, as we shall show more fully hereafter, are entirely different in character from the certificate of an entryman upon the public lands of the government. The allotment patent is altogether different from the ordinary patent from the government. In the case of the ordinary government grant the entryman's title has its inception in the statutes, but by allotment or partition, through a fiction of law, each enrolled member received an individual allotment of land *which was in theory of law that which he had owned all the time but not theretofore segregated.* Just as in a partition suit between the heirs each person has set aside to him by final decree of the court or by deed the precise tract of land which by a fiction of law he inherited from his ancestor, so by fiction of law the segregation of an individual allotment for Barney Thlocco by partition was merely the segregation for him and for his heirs after him of his part of the public domain of the Creek Nation. In short, the allotment to any member of the tribe or upon his behalf was but the designation of that part of the tribal domain which by a fiction of law he had owned theretofore, though the nation and not the members thereof owned the public domain.

In *Skulthis v. McDougal*, 170 Fed. 529, the Circuit Court of Appeals for the Eighth Circuit, in discussing a Creek allotment, said:

“ The right to such a share is not created by the statutes, but is simply recognized and enforced by them * * * While the tribe in carrying out the project grants the legal title to the property, it does not confer the right to that property. *The act by which the distribution is made is spoken of not as a grant, but as an allotment.* * * * When, as here, the time came to disband the tribe, its ownership as a political society could no longer continue, and *the division of its property was far more nearly akin to the partition of property among tenants in common than the grant of an estate by a sovereign owner.* Under such a scheme it cannot be said that the property which passed to an allottee is a new right or acquisition created by the allotment. The right to the property antedates the allotment, and is simply given effect to by that act. Viewing the tribal property and its division in this light, Andrew J. Berryhill acquired his right to the land in question by his membership in the tribe. *It was his birthright.*” (Italics ours.)

And on the same point the court said:

“ Every person whose name was entered on the roll was entitled to an equal proportion of the tribal land and funds.”

In *McDougal v. McKay*, 237 U. S. 372, this court expressly approved the foregoing doctrine of the *Shulthis* case.

The contention that any particular form of certificate or conveyance was necessary to vest the heirs with title to the *birthright* of their ancestor, which birthright was inherited by them, is wholly inconsistent with the theory upon which allotment was made.

The entire domain of the Creek Nation has been partitioned. The few scattering tracts which were not taken in allotment have been sold and the proceeds held for the benefit of all the tribe as equalization money. Each enrolled member of the tribe will receive enough equalization money to make his allotment the equal in value (as of the date of allotment) to that received by every other Creek Indian. The defendants claiming through Posey are here in the attitude of asserting that this great scheme of partition has broken down as to certain beneficiaries thereof through a technical error of the officers charged with administering the laws for the final distribution of the lands. Take, for illustration, an ordinary case of partition: practically all of the claimants have received by final decree of the court or by proper conveyances their proportionate share of the lands in partition; but a few of those entitled

to receive their *pro rata* share of the lands have not yet received, in technical form, the complete evidence of their ownership in and to the particular tracts set apart and designated for them. Can it be doubted that the other parties in partition cannot be heard to say that those equally entitled to lands have not received proper evidence of ownership? Certainly not. The government brings this action for the use and benefit of the Creek Nation with the intention of distributing the proceeds of this allotment among the other members of the tribe who succeeded in acquiring the particular tracts of land to which they were entitled in this great scheme of division and distribution of the tribal domain. The government can assert for the other members of the tribe no stronger claim than they can assert for themselves. *Folk v. United States*, 233 Fed. 177. The precise question here for determination is, Partition of all the public domain having been undertaken among the members of the tribe who were living April 1, 1899, one of whom was Barney Thlocco, can the other members of the tribe assert successfully that Barney Thlocco shall not receive his *pro rata* share of the lands? No reported case holding patent in the name of a dead man void is analogous to the situation presented here where *the heirs are not dependent upon a grant nor upon the statutes* but assert their tribal right to a proportionate share of

the public domain of which there has been a partition. The scheme of allotment is such that the right of the heirs through their ancestor is in no manner impaired for want of a formal certificate or formal patent, for such is not the nature of the tenure of land taken in partition.

(3) *The Commission was required by mandatory Acts of Congress to make arbitrary allotments in cases where the enrolled members did not select for themselves within a reasonable time (the privilege of selection not being accorded to the heirs). Acceptance of allotment certificates and patents was not necessary to pass title. According to departmental practice and construction of the statutes involved, not only did the Commission have the right to make arbitrary allotments but the certificate of allotment and patent in the name of the dead allottee are valid.*

Upon behalf of the defendants claiming through Posey the right of the Commission to make arbitrary allotments is challenged. The defendants contend that the provisions of the law directing and authorizing the Commission to make final rolls and to allot all the lands are mandatory upon the Commission. The defendants also assert that there is no provision

of law which either required or permitted the heirs of a deceased member of the Creek Tribe to make a selection upon behalf of their ancestor. Where allotments were made in the name of living Creeks the members of the tribe were permitted to select for themselves, but no mandatory requirement to select is anywhere placed upon the members of the tribe. In some of the other tribes the time within which citizens might select their allotments was fixed by Acts of Congress with the further provision that if they failed to make selection the Commission should allot for them. But in the Creek Nation, no time limit for selection having been made, it would follow that every citizen would have a *reasonable* time within which to make selection and that at the expiration of such reasonable time it became the duty of the Commission to allot arbitrarily; for *otherwise the entire allotment scheme must have broken down and failed to accomplish the end which Congress had in view*, namely: the dissolution of the tribal government, and final partition of the tribal estate.

The Acts of Congress authorizing and touching the activities of the Commission contain plain and *mandatory* provisions for the making of allotments. By the Act of March 3, 1893 (27 Stat. L. 645), the Commission was created "for the purpose of extinguishment of the national or tribal title to any

lands within that territory now held by any and all of the said nations or tribes, either by the cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes respectively, as may be entitled to the same." All of the work of the Commission from the time it was created until it was abolished, had this end in view.

The first direct authority conferred upon the Commission to allot the land to the individual members of the tribes was contained in the Original Curtis Act, under the terms of which the allotment work was first started in the Creek Nation, a land office having been opened at Muskogee on April 1, 1899. There was nothing in this act which gave a citizen the right to select an allotment, but it was provided that "whenever it shall appear that any member of a tribe is in possession of lands, his allotment *may* be made out of the lands in his possession, including his home, if the owner so desires." Wide publicity was given by the Commission throughout the Creek Nation in regard to the opening of a land office and although no right was given by law to citizens to make selections, the Commission extended to them the privilege. The Creek Land Office was opened more than two years before the Original Creek Agreement became effective, and approximately 10,000 allotments,

or more than half of all those made in the Creek Nation, were made under the provisions of the Original Curtis Act. *deGraffenried v. Iowa Land & Trust Co.*, 20 Okla. 687, 95 Pac. 624-631.

Then came the Original Creek Agreement, which became effective on May 25, 1901, and which contained an unequivocal *command* to the Commission to make allotments. Section 3 (31 Stat. L. 861) provided: "All lands of the said tribe, except as herein provided, *shall* be allotted among the citizens of the tribe by said commission, so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the government survey—which may be selected by him so as to include improvements which belong to him." Permission was thereby extended to citizens to select their allotments in order, primarily, to have the allotment of each citizen include the improvements owned by him. But if a citizen failed to avail himself of the permission within a reasonable time after the Original Creek Agreement became effective, the mandate to the Commission, expressed in the words "shall be allotted," remained, and the duty was on the Commission to carry out the purpose and policy of Congress by setting apart the allotments.

A reading of the Original Agreement discloses that wherever Congress is giving to the citizens permission to make selections, the word "may" is used, but that wherever Congress is giving directions to the Commission about the performance of its duty, the word "shall" is used. The agreement says that the land "*shall* be allotted among the citizens of the tribe by said Commission"; that "there *shall* be allotted to each citizen one hundred and sixty acres of land" which "*may* be selected by him so as to include his improvements"; that "allotment for any minor *may* be selected by his father," etc; that "allotments *may* be selected for prisoners, convicts, etc., by their duly appointed agents, and for incompetents by guardians, etc., but it *shall be the duty* of said Commission to see that such selections are made for the best interest of such parties." To have given the word may a mandatory meaning in the statute under consideration, would have devitalized the whole purpose for which the Commission was created, that is the allotment of the lands in severalty. It was a fact well known to Congress and the administrative officers of the government, that a great many Creeks were bitterly opposed to the individual ownership of the tribal lands. They embarrassed the Commission in all possible ways and many would not make selections for themselves. Another class of Creeks was made up of those who were either too

indifferent or ignorant to avail themselves of the opportunity to make selections. The Creek Land Office was open for more than three years before any arbitrary allotments were made, and there was earnest effort to induce the Creeks to make selections for themselves before the Commission proceeded to carry out the direction of Congress by allotting the lands arbitrarily. If, after three years, a citizen had made no effort to select his allotment, it certainly was reasonable to presume that he either did not intend to make selection or that he was too indifferent touching the whole matter to care whether he received land or not. When the Indian was a minor, the same presumption would apply to the failure of his legal or natural guardian to select for him. It would be absurd to say that the whole scheme of the government looking to the allotment in severalty of the Creek tribal domain could be thwarted by the stubborn refusal or indifferent failure of some Creeks to select allotments. If the Commission had been compelled to sit supine and await selections, the allotment work could never have been completed, and the great policies of Congress, for which the gigantic task of allotting in severalty the domains of the Five Civilized Tribes was undertaken, could never have been made effective. It must always be remembered that Congress had plenary power to dissolve the tribal governments and allot the land among the individual

members without the consent of the tribes or the members themselves.

—*Gritts v. Fisher*, 24 U. S. 640;

Lone Wolf v. Hitchcock, 187 U. S. 553;

McKee v. Henry, 201 Fed. 74;

Sizemore v. Brady, 235 U. S. 441.

It was under this plenary power that Congress charged the Commission with the duty of making the allotments. The permission to citizens to select allotments for themselves was not made an absolute right, and lapsed unless exercised within a reasonable time.

The reports of the Commission, as submitted annually to the Secretary in 1902 and the years following, state cogently the reasons for which, and circumstances under which, allotments were made arbitrarily, and the practices of the Commission in that regard were well known to the Department and to Congress.

At page 39 of their annual report for the fiscal year ending June 30, 1902, the Commission said:

“ The allotment of lands in the Creek Nation was commenced on April 1, 1899, a preliminary allotment of 160 acres being given alike to Creek Indians and Creek freedmen. This work was instituted under the Act of Congress of June 28,

1898 (30 Stat. L. 495), and was continued under the Creek Agreement approved by the Act of Congress of March 1, 1901 (31 Stat. L. 861), which latter legislation confirmed allotments previously made, and in terms, authorized a continuance on the lines adopted by the Commission * * *. A total of 13,144 complete allotments, of 160 acres each, have been made; 1,331 of these were arbitrary allotments made by the Commission for those who persistently refused or neglected to act for themselves, and the remainder were selected by the allottees or their recognized representatives. Partial allotments have been made to an additional 728 persons, and while the exact number of citizens is yet to be determined, it is not believed there remain more than 1,350 allotments to be made out of a total of 14,500. In those cases where arbitrary allotments have been made by the Commission, care has been exercised to see that each allottee received his improvements, or, in the absence of improvements, that land of at least average value was given him. To accomplish this a small party was equipped with a camp outfit and dispatched to the locality in which the neglectful or unwilling allottees made their homes. By the aid of interpreters and a surveyor, it was found possible to locate with a very satisfactory degree of accuracy, the rightful holdings of such citizens; and it is believed that the arbitrary allotments thus made fully meet the requirements of the law and the best interests of those who were attempting to evade it. The party which was organized for this work traversed all that coun-

try lying north of the South Canadian river for a width of 15 miles, beginning on the east boundary and extending to the west boundary of the Creek Nation; all that part of the nation lying east of the Oklahoma line for a width of 18 miles, and north to within 12 miles of the north boundary of the nation, and also all that country situate between North Fork and Deep Fork rivers. The majority of those whose allotments were so located are members of the so-called 'Snake Band,' which is still opposed to the enforcement of the agreement ratified May 25, 1901. In many instances, the members of this faction openly defied the Commission's field men to make a traverse of their improvements, but after the arrest and conviction of a number of the leaders, their followers more readily acquiesced, and, in some instances, signified a willingness to select their land. Many of these Indians were found in an impoverished condition, not possessed of sufficient means to appear at the Commission's allotment office in Muskogee, even though so inclined."

It thus appears that up to June 30, 1902, the Commission had made 1,331 arbitrary allotments in the Creek Nation "for those who persistently refused or neglected to act for themselves." At page 27 of the report for the fiscal year ended June 30, 1903, the Commission said:

" During the fiscal year ended June 30, 1903, 3,499 allotments have been made to Creek citi-

zens; of this number 2,268 was selected by the allottees in person or by their accredited representatives; 329 were made to the heirs of deceased persons and 852 were arbitrary allotments made by the Commission."

At page 31 of the report for the fiscal year ended June 30, 1904, the Commission said:

" Allotments were made during the year to 624 citizens and freedmen of the Creek Nation. Of this number, however, 348 were made arbitrarily by the Commission, 46 being made to the heirs of deceased citizens. All others were made upon personal application of the allottees or their authorized representatives. It is proper to state that in cases where the Commission feels called upon to arbitrarily designate an allotment in whole or in part the selection is made with great care, the best available land being used, with due regard to the location of such land as relates to the allotments of other members of a family or a partial allotment previously selected by the person to whom land is arbitrarily allotted. If it appears from the improvement plats that the allottee owns improvements, he is, of course, given the land which contains his improvements. If he has none, care must be taken not to allot land containing the improvements of another citizen or which would be likely, for any cause, to result in contest proceedings. In short, every effort must be made to make the allotment for the best interest of the allottee."

At page 51 of the report for the fiscal year ended June 30, 1905, the Commission said:

“ Only 1,326 allotments were made during the year, and most of those involved only small tracts of land necessary to complete partial allotment selections previously made. The total area of land allotted during the year is but 37,450.21 acres, the average acreage of each allotment being 28 acres. Of the 1,326 allotments made, only 547 were personally applied for by the allottees, 49 being applied for by the heirs of deceased citizens entitled to allotments of land, while 330 were made arbitrarily by the Commission. The total number of names upon the approved roll of Creek citizens at the close of the fiscal year is 15,513. Of this number 15,356 have received complete allotments of 160 acres each, 50 have selected a part of their allotments, and 107 have made no selection whatever.”

We see that up to June 30, 1905, 15,356 complete allotments had been made to citizens of the Creek Nation, of which 3,261, or more than 20 per cent, were made arbitrarily by the Commission. The Commission's reports went to the Secretary and to Congress and all these thousands of arbitrary allotments were approved, in effect, when the Secretary approved the patents. The authority of the Department to make the allotments was clear and unquestioned.

Congress could have allotted the lands in any manner that it saw fit without even extending to citizens the privilege of selecting allotments so as to include their improvements, and the question arises: Did Congress give the right of selection to the heirs of a deceased enrolled citizen who were entitled to an allotment as such heirs under section 28 of the Original Creek Agreement, ratified by Act of March 1, 1901 (31 Stat. 861)?

Said section is in part as follows:

“ All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred ninety-eight, entitled ‘An Act for the protection of the people of the Indian Territory, and for other purposes,’ shall be placed upon the rolls to be made by said commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.”

Nowhere, either in the Original or Supplemental Creek Agreement (32 Stat. 500), is provision made

for the heirs to select the lands to which they were entitled under the above section. Furthermore, it would lead to endless confusion and be *absolutely impracticable* in many cases to require selection by the heirs as a condition precedent to making a valid allotment to them. In the first place no provision is made for any particular heir to select and where there were several heirs who wanted different tracts, whose selection should be allowed? Should no selection be made at all, would the right of the heirs to an allotment fail for this reason, and if so, when, and by what authority? Again, would it be encumbent upon the Commission to determine who the heirs of a deceased citizen were, and if so by what authority? And should it make an erroneous decision and allot land selected by the wrong person, would it not be required upon ascertaining the true facts to allot the land selected by the rightful heir? It is unnecessary to pursue this line of argument further, for it can readily be seen that to hold that Congress intended that *the heirs* should have the absolute *right* to select an allotment, would be to convict it of gross ignorance and stupidity.

In the Choctaw, Chickasaw and Cherokee Nations Congress permitted selections of allotments to be made by the executor or administrator of the estate, but it was expressly provided that if such

executor or administrator failed to act the Commission should designate the lands to be allotted.

Section 22 of the Choctaw and Chickasaw agreement ratified by Act of July 1, 1902 (32 Stat. 641), is as follows:

“ If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided*, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted.”

Section 20 of the Act of July 1, 1902 (32 Stat. 716), providing for the allotment of the lands of the Cherokee Nation, is almost identical with the above.

The Seminole agreement, ratified by Act of June 2, 1900 (31 Stat. 250), is similar to the Creek Agreement in this respect.

In construing agreements with any of the Five Civilized Tribes, the courts have frequently referred to the agreements with the other tribes and the Acts of Congress relating thereto, and have construed the same together (*Mullen v. United States*, 224 U. S. 448), and in construing the agreements and acts together in this case we see that Congress, while specifically extending the privilege of selection to the executor or administrator in the Choctaw, Chickasaw and Cherokee Nations, made no provisions whatever in the Creek Nation for the selection of an allotment by any one on behalf of the heirs of a deceased citizen. The selection was therefore left to the Commission, as in Choctaw, Chickasaw and Cherokee Nations, where an executor or administrator was not appointed or failed for any reason to make the selection.

Furthermore, the privilege of selection by the executor or administrator is granted in the same section that provides for the descent of the lands to the heirs where the enrolled citizen died before receiving his allotment, and, following the reasoning of the Supreme Court of the United States in *Skelton v. Dill*, 235 U. S. 206, wherein it was held that since no

provision was made by section 28 of the Original Creek Agreement restricting alienation by heirs of lands allotted to them as such, the same were free from restrictions, it would seem that no provision having been made by section 28 for the right of selection, the heirs would have no such right.

In *Mullen v. United States*, 224 U. S. 448, the court considered a similar question holding allotted lands unrestricted except where express provision is made by statute for such restrictions and holding that there is no authority for the selection of an Indian homestead except by the express provision of the statute. This case appears to be conclusive authority in support of the proposition that the heirs had no right to select allotments upon behalf of their ancestor, such right not having been given by the statute. The court said:

“ In the cases falling within this paragraph (section 22) there is no requirement for the selection of any portion of the allotted lands as a homestead, and there is no ground for supposing that it was the intention of Congress that a provision for such selection should be read into the paragraph, so as to assimilate it to paragraph 12 relating to allotments to living members. While the lands were to be allotted in the name of the deceased allottee, they passed at once to his heirs, and as each heir, if a member of the tribe, was already supplied with his home-

stead of 160 acres, there was no occasion for a further selection for that purpose from the inherited lands. No distinction is made between the heirs; they might or might not be members of the tribe, and where there were a number of heirs each would take his undivided share. It is quite evident that there is no basis for implying the requirement that in such case there should be a selection of a portion of the allotment as a homestead, and all the lands allotted under paragraph 22 are plainly upon the same footing. While it appears from the record that, in the present case, separate certificates of allotment were issued for homestead and surplus lands, this was without the sanction of the statute."

It will be observed that in extending the privilege of selection to the executor or administrator of the deceased's estate in the Choctaw, Chickasaw and Cherokee Nations, time is made the essence of the agreement, and if an executor or administrator "be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and practicable time, the Commission shall designate the land thus to be allotted."

Therefore, there rested upon the Commission the *mandatory obligation to select for and allot to or upon behalf of the heirs of Barney Thlocco the lands to which he would have been entitled if living. There*

was no duty resting upon the heirs in that respect. Their vested right to have precisely that which their ancestor would have taken if alive was not impaired by mistake or inadvertence, if any, upon the part of the Commission. The gist of the contention is that the form of allotment certificates was erroneous in that it contained the name of Barney Thlocco instead of the words "heirs of Barney Thlocco," but such contention is not in accord with the great scheme of the government which contemplated that its own officers should be charged with the duty of selecting and delivering to the heirs of the deceased member an allotment and with suitable evidence of the title thereof. We believe that we may assert that the government has never permitted such a right as that vested in the heirs to fail in the case of an Indian partition or allotment. That all the proceedings up to and including the survey, the appraisement and the actual selection of the allotment as and for the Barney Thlocco allotment were entirely regular, there is no question. If the allotment certificate, the evidence of the selection, was made in the wrong form through no fault of the heirs, such mere error of form upon the part of those acting upon behalf of the tribe can make no difference.

The plan of the government for winding up the affairs of the tribe did not require acceptance by the

heirs of the allotment certificate or of the patents. In considering this point, it must be kept in mind that Congress had determined to break up the tribal relations. There was to be no more Creek Nation. The *Indians* were to cease to exist as such, except as a tribe for the purposes of tribal dissolution and partition and distribution of the tribal property, and except as to restrictions on certain lands to extend for a limited period. Plans were made for terminating the guardianship of the government over the Indians. Plenary power was exercised whenever the Indian tribes as such, or the individual members thereof, failed or refused to meet the demands of Congress. We need not cite authorities in support of the familiar proposition that the government gradually abandoned the idea of treating with these Indian tribes with the result that the so-called treaties of more recent years were not treaties at all, but Acts of Congress merely; the consent of the tribes was formal purely, and was sought for reasons of expediency and policy. Throughout all the so-called treaties with the Five Civilized Tribes providing for the allotment of the lands there is in evidence the desire of Congress to make it appear to the members of the tribes that they were consenting, acquiescing, acting for themselves, relinquishing their rights in the public domain in favor of allotments. Many parts of these treaties are purely surplusage, without any

legal force whatever, *inserted for reasons of diplomacy, policy or politics.* The Indians delighted in their tribal politics. For illustration, at section 23 of the Original Creek Agreement there is found the provision "All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his deed." It is entirely clear that this provision in the treaty has no legal effect for the reason that the government never had any interest in the tribal domain except the possibility of reversion—the ultimate title—in the event the tribe should abandon the lands; but when provision was made for the allotment of all the lands to the members of the tribe, Congress having expressly provided that all the lands should be partitioned in severalty among the members of the Creek Nation, there was no longer any question of ultimate title in the government; there was no longer any question of possible reversion to the United States. *Likewise, the provision found at said section twenty-three: "Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title, and interest in and to the same, except in the proceeds of lands reserved from allotment," is without any legal force.* This provision

was more in the nature of a political speech to the members of the tribe than anything else. The theory upon which the allotment was made was this: In lieu of the Indian title by which every member of the tribe had the right to the use of any part of the public domain not in use by another member, each member should take a particular tract of land, which, together with his equalization money, should stand as and for his entire right to the tribal property. *Certainly the plenary power of Congress was sufficient to partition the lands according to the scheme finally adopted in the Original Creek Agreement and thereby vest each allottee with full title to his individual allotment and at the same time completely divest him of all right, title or claim to any part of the public domain of the nation, and precisely this was done by other provisions of law without reference to that part of section 23 here under discussion.*

Section 23 of the Original Creek Agreement also provides, "All deeds when so executed and approved shall be filed in the office of the Dawes Commission, and there recorded without expense to the grantee, and such records shall have like effect as other public records." This language contemplated the recording of the patents by the Commission in books of public record *before* actual delivery to the allottees. Congress was familiar, of course, with the rule

which title from a sovereign passes by record. It certainly was not the intention of Congress to deliver the patents to the thousands of Creek allottees and then to undertake to procure the return of the patents for the purposes of the record. The published reports of the Commission show that the patents were always recorded in the public records before attempt was made at actual delivery. In the case of Thlocco the patents were recorded on the 14th day of April, 1903. If the delivery of patents to individual citizens was a necessary condition precedent to the passing of title, or necessary for any other plan of the government, then it is strange that Congress provided for the recording of patents before delivery. *If the citizens had the right under the law to reject the patents, to decline to accept the title, then we would have an impossible situation, with the patents recorded in the office of the Commission, in place of public record, as clouds upon the title of the tribe and of any subsequent allottee of the land.*

In *Gritts v. Fisher*, 224 U. S. 640, 56 L. ed. 928, the court unmistakably rejected the contention that the members of the tribe, as individuals, had any property rights in the tribal lands after allotment. The Original Cherokee Agreement designated exactly who should be the beneficiaries of the tribal domain and moneys, and closed the rolls against all

persons born after September 1, 1902. Afterwards Congress, by the Act of April 26, 1906, provided for the enrollment and allotment of other Cherokees, namely: those born after September 1, 1902, and the validity of the Act of 1906 was challenged on the ground that to add to the rolls the name of the new-born members of the tribe and allot them lands was in effect diminishing the *quantum* of undivided interest conferred upon each Cherokee as a tenant in common under the Cherokee Agreement of 1902. The argument was made that the Act of 1902 diminished *pro tanto* the *pro rata* interest held by each Cherokee under the Act of 1902. The *plenary power of Congress was sustained, the court holding that Congress could extinguish the claim of the individual members to an interest in the public domain.* The case of *Choate v. Trapp*, 224 U. S. 665, involving the right of the state to tax certain lands in the Choctaw and Chickasaw Nations, does not, when properly analyzed, support the claim that it was necessary for the members of the tribe to accept their patents. There Congress had proposed a treaty to a political entity, a dependent nation, providing that upon final allotment certain lands allotted to the individual members of the tribe should be non-taxable for a given period, and the tribe, as such political entity, having accepted the proposition, it was held that the same was binding upon the United States. In short,

it was held that the government would not break faith with the Indian tribe in a matter of that sort.

In *Fleming v. McCurtain*, 215 U. S. 56, 54 L. ed. 88, the court held that although the Choctaw Treaty of Dancing Rabbit Creek, of September 27, 1830, and letters patent of March 23, 1842, constituted a grant from the United States to the Choctaw Nation of "a tract of country west of the Mississippi river, in fee simple to them and their descendants," the individual citizens of the Choctaw Nation acquired no separate or individual property rights as tenants in common or otherwise in the tribal property. The members of the Creek tribe, therefore, had no individual or separate rights which required relinquishment of the sort described at said section 23. While such separate rights in the individual members of the tribe seem to have been recognized in the Original Creek Agreement, this was by fiction of law for the purposes of the allotment plan.

Even assuming that the delivery of deeds and acceptance thereof by the enrolled citizens who were living was essential, it by no means follows that there had to be a delivery and acceptance of such deeds by the heirs where an allotment was made upon behalf of a deceased member. This was impracticable. Take the case of Thlocco: some forty or fifty persons claim to be his heirs. There are many groups of these

heirs or claimants each asserting entire ownership. To which heir or group of heirs was delivery to be made? Which of the claimants was authorized to accept? How could any particular claimants accept for the rest? What would have been the result if one of the heirs had been willing to accept that all the rest desired to reject? There was no provision of law for the Commission to determine who the heirs were. In practice the Commission did not undertake to determine who the heirs of the deceased member were. If actual delivery and acceptance were necessary, was the patent to be delivered to one heir, accepted by him, then returned, and offered to another, and so on? Let it be granted for a moment, for the sake of argument, that acceptance by the members of the tribe was necessary to extinguish their title and claim to the other part of the public domain. Each heir who was a citizen of the tribe had his individual allotment. The acceptance of a deed to his own allotment extinguished his right to the other lands. If the heir was a non-citizen of the Creek Nation he had no right in the other lands to extinguish. *The only purpose, therefore, which can be assigned as a reason for acceptance by enrolled members utterly fails in the case of heirs, for by taking their own titles they were "deemed to assent to the allotment and conveyance of all the lands of the tribe."*

Finally, on this branch of the case: Tribal government having utterly failed and Congress having determined to make an end of the whole Indian problem in the Five Civilized Tribes (*Woodward v. deGraffenried*, 238 U. S. 284, 59 L. ed. 1311), it is utterly unreasonable to say that this great governmental policy was dependent for its consummation upon the consent of any enrolled members of the tribe. If the contention of Bissett and his associates is right, the plan would have failed. *But beyond all this, even if acceptance were necessary, it would be presumed, in the absence of a showing to the contrary.* *United States v. Shurz*, 12 Otto 378, 26 L. ed. 167, 173; *LeRoy v. Jamison*, Fed. Cases No. 8271. We must conclude, therefore, that the plenary power of Congress was entirely sufficient to carry out to its perfection the allotment scheme and to distribute to the individual members of the tribe all of the tribal property; that if Barney Thlocco was enrolled without application upon the part of the heirs such enrollment was in compliance with the law; that the heirs were not required, if indeed they were even permitted, to select the Barney Thlocco allotment; that title passed by recordation of the patent, of which we shall speak more fully later; no actual delivery to the heirs or acceptance by the heirs of the patents was necessary.

IN RE HEIRS OF JEMIMA. D-40271.

On January 24, 1916, the Honorable Andrieus A. Jones, First Assistant to the Secretary of the Interior, now United States Senator, rendered an opinion, certified copy of which is hereto attached as an appendix, in which the Department of the Interior set forth its practice and construction of various Acts of Congress here involved. The Department was asked to hold, *first*, that an allotment arbitrarily made by the Commission was void; *second*, that the certificate of allotment issued in the name of the dead citizen instead of to the heirs was void; *third*, that the patents conveying the allotment were void because issued in the name of the deceased member of the tribe, and for the further reason that they were never actually delivered to the heirs or accepted by them. All the contentions were decided against applicants, the Department holding that the Commission had the power to make an arbitrary allotment; that the certificate of allotment in the name of the dead citizen was valid, and when the deeds in the name of the dead citizen were recorded they passed the title without actual delivery or acceptance. The Secretary's opinion is in part as follows:

“ The present application purports to be filed on behalf of the heirs of Jemima, and is predicated upon the proposition that the allotment in

question is void; that the land is part of the domain of the Creek Nation and therefore subject to selection by qualified citizens of said tribe. The contention that the allotment is void is based on the following grounds:

“ 1. Because the allotment was arbitrarily made.

“ 2. Because Jemima died prior to the time the allotment was made.

“ 3. Because the deeds conveying said allotment were never delivered to Jemima or to her heirs.

“ Of course if the allotment was regularly and legally made, and the title to the land passed by virtue of the certificate of allotment and deeds of conveyance, the Department can exercise no further control over the title, and would be entirely without jurisdiction to grant the present application.

“ It was intended by the Original Creek Agreement, ratified and confirmed by Congress by Act of March 1, 1901 (31 Stat. 861), as expressed in section 3, to allot to the eligible citizens of the Creek Nation ‘all lands of said tribe, except as herein provided * * * so as to give each an equal share of the whole in value as nearly as may be.’ The manner of allotment is mentioned, and by section 45 it is further provided that ‘all things necessary to carry into effect the provisions of this agreement, not otherwise herein specifically provided for, shall be done under authority and direction of the Secretary of the

Interior.' It was not the intention that one, or any number of Indians, should defeat the purpose of Congress to allot the lands in severalty by failing, or refusing to select their allotments. Opportunity was afforded each citizen to select the land desired by him, and it was specifically provided that the selection might be made so as to include his improvements, and notice was given citizens affected by the resolution of the Commission, above mentioned, and they were allowed 30 days within which to make their selections before arbitrary allotments were made; they were not deprived of the privilege of making selections, and the action of the Commissioner in making arbitrary allotment, so far from being without authority of law, was required in many cases in order to fully carry into effect the objects intended to be accomplished by the agreement and act referred to.

“ There is no merit in the contention that an allotment in the name of a deceased person is void. Section 32 of the Act of June 25, 1910 (36 Stat. 855), provides:

“ ‘Where deeds to tribal lands in the Five Civilized Tribes have been or may be issued, in pursuance of any tribal agreement or Act of Congress, to a person who had died, or who hereafter dies before the approval of such deed, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assigns of such deceased grantee as if the deed had issued to the deceased grantee during life.’

“ The Supreme Court of the United States, in *Skelton v. Dill* (235 U. S. 206), said:

“ ‘Whether an allotment of lands in the Creek Nation which was made on behalf of Archie Hamby, a Creek child then deceased, passed the lands to his heirs free from restrictions upon alienation is the federal question in this case. The facts out of which the question arises, are these: Archie Hamby was born in February, 1900, and died in July, 1901, being survived by his parents and by at least one sister. His mother was a Creek woman, duly enrolled as such, in 1895, and his father was a white man not entitled to enrollment. Two or three years after the child’s death his name was regularly placed upon the roll of Creek citizens by the Commission to the Five Civilized Tribes, and the lands in question were duly embraced in an allotment made on his behalf. A deed for them was also issued in his name, and this, by operation of law vested the title in his heirs.’

“ In the case of *Mullen v. United States* (224 U. S. 448, 456), the court said:

“ ‘It is true that under the Creek Agreement, in cases where the ancestor dies before allotment, the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw Agreement the allotment was to be made in the *name* of the deceased member and “descend to his heirs.” This, however, is merely formal distinction

and implies no difference in substance. both cases the lands were to go immediately to the heirs.'

" In the supplemental memorandum filed on behalf of the applicants, it is suggested that amended or substitute deeds issue, to contain an appropriate clause to the effect that the same are issued merely for the purpose of validating the allotment heretofore made, and thus remove the legal objection that the same was made to a dead person. It is urged that all proper claimants would be protected thereby, and that such action could hurt no one. If the Department is correct in holding that there is no legal objection to an allotment to a dead person, there is no necessity for the issuance of substitute or amended deeds, and if this allotment is ever cancelled by a court of competent jurisdiction, it will be time enough to consider this request then.

" From the foregoing, it will be seen that the allotment in question was legally made, but it is argued by the applicants that there must have been an acceptance of the deeds before title passed and the jurisdiction of the Department ends, and that herein lies the distinction between this case and those relating to the disposition of the public lands of the United States, where the courts have frequently held that upon the issuance and recordation of patent the control of the Department over the title to the land embraced therein ceases and it can only be attacked through appropriate action in the courts. In this connection it is sufficient to say that if a

ceptance is essential, ample proof thereof is found in the conduct of the present applicants in voluntarily intervening in an action now pending in the District Court of Creek County, Oklahoma, which involves the title to the land in question, and claiming title thereto by virtue of the issuance of the certificate and deeds above referred to.

“ The Circuit Court of Appeals for the 8th Circuit, in speaking of the jurisdiction of the Commission to the Five Civilized Tribes in the issuance of allotment certificates and deeds to citizens of the Choctaw and Chickasaw Nations, and the force and effect thereof, in the case of *Wallace v. Adams* (143 Fed. 716, 721), (affirmed by the Supreme Court of the United States in 204 U. S. 415), said, page 721:

“ ‘The jurisdiction of the Commission and of the Secretary and the effect of their action in the allotment of the lands of the Choctaw and Chickasaw Nations are the same in effect as the jurisdiction and effect of the action of the Land Department of the United States in the disposition of the public lands within its control. The Commission under the direction of the Secretary constitutes a special tribunal vested with the judicial power to hear and determine the claims of all parties to allotments of these lands and to execute its judgments by the issue of the allotment certificates which constitute conveyances of the right to the lands to the parties who it decides are entitled to

the property. This tribunal undoubtedly has exclusive jurisdiction to determine such claims and to issue such a conveyance. The allotment certificate, when issued, like a patent to land, is dual in its effect. It is an adjudication of the special tribunal, empowered to decide the question, that the party to whom it issues is entitled to the land, and it is a conveyance of the right to this title to the allottee. *U. S. v. Winona & St. Peter R. Co.*, 15 C. C. A. 96, 103, 67 Fed. 948, 955. Like a patent, it is impervious to collateral attack. But, as in the case of a patent, if the Commission or the Secretary has been induced to issue the allotment certificate to the wrong party by an erroneous view of the law, or by a gross or fraudulent mistake of the facts, the rightful claimant is not remediless. He may avoid the decision and charge the legal title to the lands in the hands of the allottee, as he may that of the grant to a patentee, with his equitable right to it either on the ground that upon the facts found, conceded, or established without dispute at the hearing before the special tribunal, its officers fell into an error in the construction of the law applicable to the case which caused them to refuse to issue the certificate to him and to give it to another, or through fraud or gross mistake it fell into a misapprehension of the facts proved before it which had a like effect. *James v. Germania Iron Co.*, 46 C. C. A. 476, 479, 107 Fed. 597, 600.'

“ In the case of *United States v. Dowden* (220 Fed. 277), the court said (syllabus) :

“ ‘The selection of an allotment of land by a member of the Chickasaw or Choctaw Tribe of Indians, and the issuance of a certificate of allotment therefor by the Commission to the Five Civilized Tribes, pursuant to statute, vests the allottee with an absolute right to a patent, which may be enforced in the courts, and the Secretary of the Interior has no power to thereafter cancel the allotment and segregate the land for a townsite.’

“ It is too well settled to admit of doubt, or necessitate the citation of authorities, that upon the issuance and recordation of patent to public lands, this Department’s jurisdiction and control over the same is at an end, and since its jurisdiction is the same in effect as to the issuance of final certificates and allotment deeds to members of the Five Civilized Tribes, it follows that it has no jurisdiction to exercise further control over the title to the land herein involved, unless and until the allotment is canceled in a court of competent jurisdiction.”

That the Secretary’s opinion in the *Jemima* case directly states the practice and construction of the Department for many years is manifest from the fact that in the opinion no reference is made to any contrary practice or opinion of the Department, for in departmental opinions if any former practice is

disapproved or prior construction overruled the same is expressly referred to.

The practice in the case of Thlocco supports the view that the opinion of Senator Jones has always been that of the Department. When the Creek Attorney, after the recordation of the Barney Thlocco patents, wrote the Commission challenging the right of Thlocco to an allotment resulting in an *ex parte* investigation without notice to the heirs and finally attempted cancellation of the enrollment of Thlocco, no effort was made by the Secretary to cancel the allotment certificate or patents through any instrumentalities within his Department, but he expressly referred the entire case to the Department of Justice for court action excepting, only, the mere matter of the enrollment. The name Barney Thlocco was stricken from the rolls merely in order that the heirs might not participate in the distribution of moneys of the tribe. The Secretary did not at the time of the attempted cancellation of Thlocco's enrollment question the right of the Commission to make the arbitrary allotment or question the validity of the allotment certificate and patents in the name of the dead citizen, but based his action entirely upon his finding that Thlocco died before April 1, 1899, and for that reason was not entitled to an allotment. We shall discuss this point more fully under the caption "At-

tempted Cancellation of Thlocco's Enrollment," where it will clearly appear that the Secretary made no such claims as those now put forward upon behalf of Bissett and others.

- (4) ***This case is not analogous to an action involving patent issued to a fictitious person. The authorities cited involving patents to fictitious persons examined and found to be not in point.***

The case of *Moffat v. United States*, 112 U. S. 24, 28 L. ed. 623, is the leading federal case holding that a patent to a fictitious person is void. It is easily distinguished from the case of Thlocco. There the Register and Receiver of the public moneys and land office conspiring to defraud the government of a patent for the land, *forged*, in usual form, the series of pretended papers upon which the patent was finally issued. *There never was an entryman or any right of entry involved.* That case differed from this in the following important aspects: *First*, the government first of all impeached the patent by showing that fraud was practiced upon the Department, which impeachment was made in the manner usual where the government seeks to set aside its patent. But here the government, without impeaching the patent, without showing there was no right to a patent, seeks to avoid the burden assumed and discharged by the gov-

ernment in the *Moffat* case as preliminary to its recovery. *Second*, in the *Moffat* case the grantee never lived; the pretended grantee was purely a fiction, a myth. But Thlocco did live. It is admitted by the government in its bill that he did live at least until the month of January, 1899, and within a few weeks of the date, to-wit: April, 1, 1899, when all citizens then alive were to be enrolled. *The moment Thlocco died he left heirs. Not so in the case of a fictitious grant. In this case there was always somebody alive to take the title, either the original allottee, Barney Thlocco, or his heirs.* The bill admits that the defendants, or some of them, are the heirs of Thlocco. A third distinction between the *Moffat* case and this is found in the important fact that there was a *descent* from Thlocco to his heirs immediately upon his death by which the law cast upon his heirs the beneficial right to take the lands *as of the date of the death of their ancestor precisely as if he had lived to take the lands and had died vested with the full title.* Here, invoking the doctrine of the *Mullen* case, *supra*, the error, if error it was, in the issuance of the patent in the name of the dead man instead of the heirs, was a *mere difference of form and not of substance.* The necessary conclusion is that this is not a case of patent to a fictitious person. The defect in the *Moffat* case was of substance, not of form. In any conceivable case where patent is issued to a fictitious

person it would be possible for the government to assert its right to set aside the patent either for error of law, for gross mistake of fact or for fraud. It could not be done on any other ground. In all the reported cases in point where the government prevailed in the cancellation of a patent to a fictitious person, it was upon the ground of fraud. In every instance as preliminary to a retrial of the question passed upon by the Land Department, the patent was impeached for fraud. The case of *McLeod v. United States*, 187 Fed. 261, was where the officers of the government "*faked*" a name, *forged* all the papers and procured the issuance of a patent. No question of a beneficial right in any living person was involved.

UNITED STATES *v.* HAWKINS.

The government places its principal hope upon the point here under discussion in the case of *United States v. Hawkins*, 217 Fed. 11, by the Circuit Court of Appeals for the Eighth Circuit. That case is partly right and partly erroneous. *The conclusion is right in so far as it holds the allotment voidable as against the heirs. It is wrong, as was suggested by Judge Hook in a dissenting opinion in so far as it holds that the patent was absolutely void.*

Chester Hawkins died before April 1, 1899. *His heirs by fraud and perjury afterwards induced the*

*Commission to enroll Chester Hawkins upon the representations that he was alive April 1, 1899. It was held as between the government and the heirs that Chester Hawkins was not in being but was mere myth as regards the right to receive an allotment. This part of the opinion is in accord with authority and is grounded upon the proposition that the government impeached the judgment by showing that the beneficiaries of the allotment procured the same by fraud. As between the government, which was imposed upon by the heirs, and the heirs, the court considered the enrollment and allotment as nullity in a direct action brought to set aside the patent. But first of all the government had to impeach the judgment of the Commission. It alleged and proved, to impeach the judgment and to destroy the force of the patent, that the enrollment and allotment were procured by imposition of the beneficiaries of the enrollment. That is not this case. There is no pretense of fraud or imposition here. The dissenting opinion in the *Hawkins* case suggesting that the patent was voidable only and through it that the title passed to *bona fide* purchasers is thoroughly sound and in accord with the decisions. Strictly speaking the patent was not absolutely void as between the government and the heirs but only voidable. The ground on which it was set aside shows that this is true beyond question, for, the court im-*

peached the patent upon one of the well recognized grounds for impeaching a voidable finding of the land department, namely, fraud by the beneficiaries. But in this case the government has failed to find a way to impeach the finding of the Commission or to impeach the patent and therefore in contemplation of law Barney Thlocco was alive April 1, 1899. *It would have been held in the Hawkins case that Chester Hawkins was alive April 1, 1899, in contemplation of law and for the purposes of that action, had it not been for the fact that the government impeached the judgment by showing that it was procured by fraud.* An accurate statement of the law-point involved in the *Hawkins* case, we most respectfully suggest, is to say, since the heirs, the beneficiaries of enrollment, procured the enrollment and allotment by fraud, imposition and perjured testimony, the case falls squarely within one of the well defined rules for the avoidance of a voidable patent. As suggested by Judge Hook there could be no way to protect innocent purchasers without holding the patent voidable merely and not void. The decision of the Supreme Court in *Colorado Coal Co. v. United States*, 123 U. S. 307, 31 L. ed. 182, announces the rule in correct terms. There it was held that patents to lands certified and patented to names of alleged fictitious persons were voidable only and could be set aside or impeached only by showing that the defend-

ants procured the patents in the names of fictitious persons with a fraudulent intent of acquiring title in themselves. We doubt not that on a re-examination of the same point the expressions in the *Hawkins* case will be so narrowed as to imply that even in a case of that sort as between the government and the heirs the patent is voidable only and not void. This is the position the court must take if justice is to be done and innocent persons protected and if land titles are to be rendered stable and certain. But, however, that may be, for the purposes of this case, let the *Hawkins* case stand with all of its breadth and sweeping declaration and still the government fails because it has not impeached the judgment of the Commission and the patent. To sum up the *Hawkins* case as applied to the Barney Thlocco allotment, the government is constantly confronted with the proposition that Barney Thlocco was alive on April 1, 1899, until the finding of the Commission shall have been successfully impeached. Not only has the complainant here failed to attack that judgment upon the ground upon which the *Hawkins* case rests, but it has not so much as alleged or attempted to prove any ground for which any patent was ever set aside in the history of our jurisprudence. *Chester Hawkins was alive in contemplation of law until the judgment there involved was impeached.* Without impeaching the judgment involved in this case the government

by its counsel begs the entire question and assumes throughout its entire brief that Barney Thlocco was dead before April 1, 1899, entirely passing over the insuperable difficulty in the way of the government that in contemplation of the law he is considered alive on April 1, 1899, until that judgment is successfully impeached. *All the authorities hold that before any evidence at all is admissible upon the question, Was Barney Thlocco alive April 1, 1899? the government must show by clear, convincing proof either: that there was no evidence before the Commission; that there was a gross mistake of the facts established before the Commission; or that the judgment of the Commission was procured by imposition or fraud.* To the latter class the *Hawkins* case belongs. The government undertakes to put the wrong end first and would have "the cart before the horse." In the *Hawkins* case the first issue determined was, Did the heirs by their imposition and perjury procure the enrollment of Chester Hawkins? The court found that such was the case. Then the second proposition investigated was, Did Chester Hawkins in fact die before April 1, 1899? The government here undertakes to make proof of the second proposition alleged without establishing the first, without making the preliminary proof, such as was required in the *Hawkins* case.

There never was a moment when there was no a person or persons in being, either with the original or inherited right, to take the Barney Thlocco allotment. Since the Act of May 20, 1836, no beneficial right to any part of the public domain of the United States or to any Indian allotment has failed because the patent was issued in the name of a dead man.

B.

The allotment certificate was final and conclusive evidence of the complete equitable title conferred upon the heirs of Thlocco by the Original Creek Agreement. The certificate, like a patent, dual in its effect, was an adjudication of the special tribunal empowered to decide the question, was Thlocco entitled to the land, and was a conveyance of the right to full legal title.

—*Woodward v. deGraffenried*, 238 U. S. 284,
59 L. ed. 1310, 1327-1328;

Wallace v. Adams, 143 Fed. 716, 74 C. C. A.
540;

deGraffenreid v. Iowa Land & Trust Co., 20
Okla. 687;

Brown v. Carter, 42 Okla. 565, 144 Pac. 170;

Thompson v. Hill, Okla., 150 Pac.
203;

Garfield v. United States, 30 App. D. C. 175;

Mullen v. United States, 224 U. S. 448, 56 L. ed. 841;

Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49;

Garfield by United States, 211 U. S. 249, 53 L. ed. 168;

Section 23, Act of July 1, 1902, 32 Stat. 641,

Section 21, Act of July 1, 1902, 32 Stat. 716.

The allotment certificate was final and conclusive evidence of the right of the heirs to the allotment and operated as a conveyance. While in a certain limited sense the allotment certificate is analogous to an entryman's certificate for part of the public domain of the United States, there is this fundamental difference: the entryman's certificate is only *prima facie* evidence of the entryman's right to a patent. *Lewis v. Shaw*, 59 Fed. 517; *Guaranty Savings Bank v. Bladow*, 176 U. S. 448, 44 L. ed. 540. The allotment certificate is final and *conclusive* evidence of the right to a patent. "Conclusive evidence" is that which the law does not permit to be contradicted. Again, "conclusive evidence means evidence that is uncontrovertible." *Wood v. Chapin*, (N. Y.) 67 Am. Dec. 62, where it was held: "Appointment of trustees under New York absent and absconding debtors act, is conclusive evidence that the steps leading to the appointment were regular." In course of disposing of the public domain by the government there

must come a time when the officers of the Land Department have no further duties except in the performance of mere ministerial acts. In the case of government lands the Department has supervision and control until actual recordation of the patent. But this authority is purely statutory. In the case of Indians of the Five Civilized Tribes, instead of making the recordation of the patent a point at which departmental supervision would end, Congress fixed that point at the issuance of the allotment certificate and made such certificate absolutely final and conclusive of the right to a patent. There were important reasons for this. It was foreseen that it would be many years before all the patents were issued. In the case of the Seminole Nation a large part of the allotted lands had been conveyed before any patents were issued to any of the members of that tribe. *Goat v. United States*, 222 U. S. 458, 56 L. ed. 841. The various treaties with the Five Civilized Tribes providing for the dissolution of the tribal governments and partition of the lands made express provision for all of the allottees to be placed in the immediate possession of their respective allotments, and express provision was made for such allottees exercising all the rights and privileges of absolute ownership, including the right to take the timber and to mine the lands for the rich minerals known to exist in the Indian Territory, the lease for mining purposes

to be approved, in the case of restricted lands, by the Secretary of the Interior, but where the lands were unrestricted the allottees to have the absolute right to remove immediately after allotment the minerals which constitute sometimes the most valuable part of the estate. In certain cases of misdescription or the like the Commission was expressly authorized to correct certificate of allotment, but no broader authority was ever conferred upon the Commission or the Secretary of the Interior as regards the cancellation or correction of allotment certificates. Section 23 of the Act of July 1, 1902, provides :

“ Allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein ; and the United States Indian Agent at the Union Agency shall, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to such allottee and the acts of the Indian Agent hereunder shall not be controlled by the writ or process of any court.”

Section 21 of the Cherokee Agreement, Act of July 1, 1902, provides :

“ Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the tract of land described

therein, and the United States Indian Agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court."

While in the case of the Creek Nation there is no similar language making the allotment certificate final and conclusive evidence of the allottee's right to the land, as has been held by this court, notably in the *Mullen* case, the court may look to the treaties with the other tribes for the purpose of construction in a matter of this kind. The general plan was the same in all the tribes. Section 23 of the Original Creek Agreement provides, in part, as follows:

"Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal chief shall thereupon proceed to execute in due form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title, and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands as may have been selected by him for equalization of his allotment."

In *Wallace v. Adams*, 74 C. C. A. 540, 143 Fed. 716, the court said:

“ The allotment certificate when issued, like a patent to land, is dual in its effect. It is an adjudication of the special tribunal, empowered to decide the question, that the party to whom it issues is entitled to the land, and it is a conveyance of the right to this title to the allottee * * *. Like a patent it is impervious to collateral attack. But, as in the case of a patent, if the Commission or the Secretary has been induced to issue the allotment certificate to the wrong party by an erroneous view of the law, or by a gross or fraudulent mistake of the facts, the rightful claimant is not remediless. He may avoid the decision and charge the legal title to the lands in the hands of the allottee, as he may that of the grant to a patentee, with his equitable right to it either on the ground that upon the facts found, conceded, or established without dispute at the hearing before the special tribunal, its officers fell into an error in the construction of the law applicable to the case which caused them to refuse to issue the certificate to him and to give it to another, or that through fraud or gross mistake it fell into a misapprehension of the facts proved before it which had a like effect.”

Here we have an express holding that after the issuance of the allotment certificate it may be avoided like a patent only by an action in a court of equity

brought for that purpose upon one of the well known grounds for the cancellation of the patent. In *Mullen v. United States, supra*, this court, in its opinion by Mr. Justice HUGHES, said :

“ It does not appear from the allegations of the bill whether patents for the lands had been issued to the Indian grantors before the conveyances were made. But as the lands had been duly allotted, the right to patent was established; and there was no restriction in cases under paragraph 22 upon alienation of the lands prior to the date of patent. There was undoubtedly a complete equitable interest which, in the absence of restriction, the owner could convey.”

Upon the same point in *Woodward v. deGraffenried, supra*, the court said :

“ The result was to vest a complete equitable title in her ‘heirs’—in our opinion the equitable title to the Agnes Hawes allotment was vested in her according to the Creek law by the clear meaning of section 28.”

And continuing on the same point :

“ Upon familiar principles their interest, being vested, was not divested by the subsequent adoption of the Act of May 27, 1902.”

Not even Congress could divest the heirs of the full and complete equitable title cast upon them by

operation of law evidenced by the allotment certificate. *Brown v. Carter*, 42 Okla. 565, 144 Pac. 170, is to the same effect, where the court said, in the third syllabus:

“ An allotment certificate, when issued to an enrolled member of the Five Civilized Tribes of the Indian Territory, like a patent for public lands, is dual in effect. It is an adjudication of the special tribunal empowered to decide the question that the party to whom it issues is entitled to the land and it is a conveyance of the right to this title to the allottee.”

The foregoing statutes and decisions considered, it is obvious that the title of the allottee upon the issuance of the allotment certificate was entirely different from the claim of an entryman upon the public domain who has received his certificate, for in the case of the entryman he does not receive the full and complete equitable title by his certificate nor does that certificate operate as a conveyance. At the most it is only *prima facie* evidence of his claim to a patent. This important difference between the effect of the entryman's certificate and the allotment certificate in the Five Civilized Tribes arises because in the one case the entryman's certificate is made by statute temporary, interlocutory and *prima facie* only, whereas the allotment certificate is made final and conclusive to operate as a conveyance of the full

equitable title. But for further ground of difference; in the case of the entryman, he receives his land by ordinary grant by reason of his compliance with the statutes; but in the case of the allottee in the Five Civilized Tribes he receives his lands as if by partition. We do not overlook the fact that this court has held that, prior to May 4, 1907, after due notice to the allottee, the Secretary of the Interior had the authority to cancel the enrollment of such allottee, which holding would imply that the Secretary was not required after such cancellation of enrollment to issue or deliver a patent to the allottee whose name was so canceled from the approved rolls. But the effect of such cancellation would be merely to prevent the allottee from further participating in the distribution of the tribal moneys and would leave him without legal title to the land. In such a case in an action by the government to cancel the allotment the burden, we apprehend, would still be upon the government to impeach the allotment certificate in the same manner that a patent, if issued, would be impeached. Surely the United States cannot divest the heirs of the full and complete equitable title except by an action in court in which it is shown that their ancestor received the land without right, and, as we have shown in discussion of the principal question involved in this case, recovery could be had only for error of law, gross mistake of the facts proved,

or upon the ground of fraud. It is, therefore, wholly immaterial whether the legal title ever passed to Thlocco or to his heirs. The allotment certificate not having been impeached in this case in the manner required for impeaching recorded patents, the government cannot prevail.

C.

Title by patent from the United States and the Creek Nation is title by record; and delivery of the instrument to the grantee is not essential to pass the title; therefore, when the patent was recorded upon the public records on the 11th day of April, 1903, the legal title of the land passed.

—*United States v. Schurz*, 102 U. S. 273, 12 Otto 378, 25 L. ed. 167;

Peyton v. Desmond, 129 Fed. 1;

Doe v. Exer's Dugan, 8 Ohio Rep. 87, 108;

Smelting Co. v. Kemp, 104 U. S. 636, 640, 26 L. ed. 875.

In *United States v. Schurz*, the court said:

“ When a patent to a citizen for a part of the public lands has been regularly signed by the President, and sealed with the seal of the government, countersigned by the recorder and duly recorded, the right to its possession by the gran-

tee is perfect, and a writ of *mandamus* will lie to the officer in whose possession it is, to compel its delivery.

“ In the progress of the proceedings to acquire, under the laws of the United States, a title to the public lands, there must, in all cases where the claimant is successful, come a period when the power of the executive officers, who constitute the Land Department over those proceedings, ceases. That period is precisely when the last official act had been performed which is necessary to transfer the title from the government to the citizen.

“ Title by patent from the United States is title by record; and delivery of the instrument to the grantee is not essential to pass the title, as in conveyances by private persons.

“ Therefore, when the officers, whose action is rendered by the laws necessary to vest the title in the claimant, have decided in his favor, and the patent has been duly signed, sealed, countersigned and recorded, the title of the land has passed to the grantee, and there remains nothing more to be done by the Land Office but the ministerial duty of delivering the instrument, which can be enforced by *mandamus*.

“ An acceptance of the grant will, in such case, be presumed from the efforts of the grantee to secure the favorable action of the department, and especially from the demand for possession of the patent.”

The *Schurz* case invokes the ancient doctrine that the title of the sovereign passes by recordation of the patent, not by delivery, as in the case of private individuals. We have already shown that actual delivery of patent was unnecessary to pass full legal title to the allottees.

The *Schurz* case is also an authority upon the proposition that where the question involved was one of disputed law and disputed facts there can be no such thing as a void patent. On this point the court said:

“ It is clear that the right and duty of deciding all such questions belong to those officers, and the statutes have provided for original and appellate hearings in that department before the successive officers of higher grade, up to the Secretary. They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction. How can it be said that when their decision of such a question is finally made and recorded in the shape of a patent, that instrument is absolutely void for such errors as these?

“ If a patent should issue for land in the State of Massachusetts, where the government never had land, it would be absolutely void. If it should issue for land once owned by the government, but long before sold and conveyed by patent to another who held possession, it might be held void in a court of law on the production of

the senior patent. But such is not the case before us. Here the question is whether this land has been withdrawn from the control of the Land Department by certain acts of other persons, which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may be voidable, but not absolutely void.

“ The mode of avoiding it, if voidable, is not by arbitrarily withholding it, but by judicial proceeding to set it aside, or correct it if only partly wrong.”

The case of *Payton v. Desmond*, 129 Fed. 1, 9, by Circuit Judge VAN DEVANTER, now Mr. Justice VAN DEVANTER, is an excellent authority to the same point.

In *Smelting Co. v. Kemp*, 104 U. S. 636, 640, 26 L. ed. 875, Mr. Justice FIELD said:

“ The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declar-

ation by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law."

The patents in this case having been recorded in the year 1903, prior to the time that the Department commenced its re-examining of Barney Thlocco's right to enrollment resulting in an attempt to cancel his name from the approved rolls, the Department had no jurisdiction. The legal title had already passed to the heirs upon recordation of the patent.

D.

Upon the issuance and recordation of the patents the legal title vested in the heirs of Thlocco under the Act of May 20, 1836, 5 Stat. 31.

Said Act of May 20, 1836, 5 Stat. 31, provides :

" That in all cases where patents for public lands have been or may hereafter be issued in pursuance of any law of the United States, to a person who had died, or who shall hereafter die, before the date of such patent, the title to the land designated therein shall inure to, and become vested in, the heirs, devisees, or assigns of such deceased patentee, as if the patent had issued to the deceased person during life."

It appears that the statute of May 20, 1836, was first applied by this court to an *Indian* in the case of *Doe v. Wilson*, 64 U. S. 457, 16 L. ed. 584, which involved a reservation on behalf of a Pottowatomie Indian.

The Pottowatomie Indians ceded to the United States their title to certain lands in Indiana, Illinois and Michigan, south of the Grand River, and certain reservations were made in favor of individual Indians; and to complete the title to the reserved lands the United States agreed to issue patents to the respective owners. It was provided: "The foregoing reservations shall be selected under the direction of the President of the United States after the lands shall have been surveyed and boundaries shall correspond with the public surveys." The reservee died before a survey of the land and of course prior to the issuance of patent. The contention was made that the patent was void because it issued after the death of the Indian. On the other hand it was claimed that the title was within the provisions of said Act of May 20, 1836, and this latter view of the law was sustained, the court holding "his grantee took the interest he would have taken if living." The court in defining the nature of the Indian title involved, said:

"The United States held ultimate title, charged with the right of undisturbed occupancy and per-

petual possession in the Indian nation with the exclusive power in the government of acquiring title.”

In brief it appears from the *Doe-Wilson* case, that the Pottowatomie title there involved was the same as the Creek title here at issue.

In *Crews v. Burcham*, 66 U. S. 352, 17 L. ed. 91, the matter of the application of the Act of May 20, 1836, to such a situation as the one here involved came squarely before this court and it was held that said act was applicable. The court said:

“ The main and controlling questions involved in this case were before this court in the case of *Doe v. Wilson*, 23 How. 457, which arose under a reservation in this treaty in behalf of the chief, Pet-chi-co.

“ It was there held that the reservation created an equitable interest to the land to be selected under the treaty; that it was the subject of sale and conveyance; that Pet-chi-co was competent to convey it; and that his deed, upon the selection of the land and the issue of the patent, operated to vest the title in his grantee.

“ It is true that no title to the particular lands in question could vest in the reservee, or in his grantee, until the location by the President, and, perhaps, the issuing of the patent; but the obligation to make the selection as soon as the lands were surveyed, and to issue the patent, is ab-

solute and imperative, and founded upon a valuable and meritorious consideration. The lands reserved constituted a part of the compensation received by the Pottowatomies for the relinquishment of their right of occupancy to the government. The agreement was one which, if entered into by an individual, a court of chancery would have enforced by compelling the selection of the lands and the conveyance in favor of the reservee, or, in case he had parted with his interest, in favor of his grantees. And the obligation is not the less imperative and binding, because entered into by the government. The equitable right, therefore, to the lands in the grantee of Besion, when selected, was perfect; and the only objection of any plausibility is the technical one as to the vesting of the legal title.

“ The Act of May 20, 1836, ch. 76 (5 Stat. 31), provides:

“ ‘that in all cases where patents for public lands have been or may hereafter be issued in pursuance of any law of the United States, to a person who had died, or who shall hereafter die, before the date of such patent, the title to the land designated therein shall inure to, and become vested in, the heirs, devisees or assigns of such deceased patentee, as if the patent had issued to the deceased person during life.’

“ We think it quite clear, if this patent had issued to Besion in his lifetime, the title would have inured to his grantee. The deed to Armstrong recites the reservation to the grantee of

the half section under the treaty, and that it was to be located by the President after the lands were surveyed; and then, for a valuable consideration, the grantee conveys all his right and title to the same with a full covenant of warranty. The land is sufficiently identified, to which Besion had the equitable title which was the subject of the grant, to give operation and effect to this covenant on the issuing of the patent within the meaning of this Act of Congress. The act declares the land shall inure to, and become vested in, the assignee, the same as if the patent had issued to the deceased in his lifetime.”

The Supreme Court of Kansas in the case of *Oliver v. Forbes*, 17 Kan. 113, applied the Act of May 20, 1836, to an Indian title similar to the one here involved.

In *Godfrey v. Iowa Land & Trust Co.*, 21 Okla. 293, 310, 95 Pac. 792, the Supreme Court of Oklahoma treated the 1836 act as applicable to a Seminole title where the treaty provisions were substantially the same as those of the Creek Nation, saying:

“ In May, 1836, Congress passed an act, providing that in all cases where patents for public lands have been or may be hereafter issued in pursuance to any law of the United States, if a person who had died, or shall hereafter die, before the date of such patent, the title to the land designated therein shall inure to and become

vested in the heirs of the devisees or assigns of such deceased as if the patent had been issued to the deceased patentee during life. Act May 20, 1836, c. 76, 5 Stat. 31.

“ In the case of *Oliver v. Forbes*, 17 Kan. 127, it was held that this act applied to the case of an Indian who had received his land under a treaty with the United States. After citing a number of cases referring to patent issued after the death of the patentee, the Kansas Supreme Court said: ‘If the patent is valid, it is so merely because it is in confirmation of other existing rights, and not because it created any new rights’.”

To remove any possible doubt Congress later by the Acts of April 26, 1906 and June 25, 1910, legislated to the same point, but irrespective of said recent legislation the legal title must have vested under the Act of May 20, 1836, for in its final analysis the whole allotment scheme was an act of the government and not of the nations of the Five Tribes. The land to be allotted was public land of the United States, subject of course to the rights of the Creek Tribe which were extinguished by agreement with the Tribe in the allotment plan.

The case of *Galloway v. Finley*, 12 Peters 264, 9 L. ed. 1079, is in point. Charles Bradford had received for military service a warrant entitling him to select a tract of land in the Virginia military dis-

trict, and died not having made his selection. The warrant was located upon certain land in the name of the dead man and a patent issued in his name. It was held "That the death of the grantee is an extrinsic fact not impairing the equity of the claim as against the government. His heirs had an interest in common in the military district with all similar claimants." It was held that the heirs took the legal title under the Act of May 20, 1836.

E.

Assuming that the legal title had not already passed, it did pass under the Act of April 26, 1906, at which date this land was not involved in a "contest" within the meaning of section 5 of said act. Said act was retrospective.

Section 5, Act of April 26, 1906, provides:

" That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued,

where the allottee died before the same became effective, shall be given like effect; and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same: *Provided*, The provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior at the date of the approval of this act."

The words, "All patents heretofore issued where allottee died before same became effective shall be given like effect," control this case, and the further provision, "All patents or deeds to allottees * * * shall be recorded in the office of the Commissioner to the Five Civilized Tribes and when so recorded shall convey legal title," places the legal title of this allotment beyond doubt, the patents in this case having been filed and recorded in the office of the Commissioner to the Five Civilized Tribes April 11, 1903. See *Shulthis v. M'Dougal*, 170 Fed. 529; *Skelton v. Dill*, 235 U. S. 206, 59 L. ed. 198; *Mullen v. U. S.*, 224 U. S. 448, 56 L. ed. 834.

Under date of December 13, 1906, the Secretary of the Interior directed the Commission to strike

the name of Thlocco from the rolls, *declaring at that time that the patents had been issued and delivered.* At pages 61 Print. Rec., appears the order reciting: "The Department has this day canceled the name of Barney Thlocco opposite No. 8592, from the partial list of citizens by blood of the Creek Nation, and has requested the Indian office to take similar action on the roll in its possession. You are hereby authorized to cancel said name from the roll in your custody. It appearing that deeds Nos. 9450 and 9451, covering the allotment selection made to said Barney Thlocco, deceased, *have been issued and delivered heretofore the Attorney General has this day been requested to take such action as he may deem proper looking to the setting aside of said instruments.*" This important departmental construction comes to two points, namely: that the deeds had been delivered and that there was no contest pending with respect to this land on April 26, 1906. Clearly, therefore, the act of April 26, 1906, operated to pass the legal title of this land if it had not passed before that date.

No Contest Was Pending.

Section 5, *supra*, contains the following exception: "*Provided*, the provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes

or the Department of the Interior at the date of the approval of this act." The term "contest" as used in the foregoing Act of Congress when applied to allotments in the Five Civilized Tribes has had always a clear and well-defined meaning and *refers to the adverse claims of different citizens to the same tract of land* and the action of the Department in the determination of such adverse claims. The term never refers to such *ex parte* proceedings as that instituted in August, 1904, when the Creek attorney wrote a letter to the Commission suggesting that Barney Thlocco's right to enrollment be investigated again. In a contest proceeding there were two parties; contests were initiated by adverse claim against a party who had applied for or filed upon land which the contestant claimed as his own; the respective claims of the parties were set forth in pleadings—complaint by the contestant, answer or demurrer by the contestee; definite rules were promulgated by the Secretary of the Interior as to the form and contents of said pleadings, notice was required as a prerequisite to give the department jurisdiction to entertain a contest. Trials were had, judgments entered, rehearings granted and denied, appeals allowed. In the eighth annual report of the Commission to the Five Civilized Tribes for the fiscal year ended June 30, 1901, at page 100 as Appendix No. 9, appears

“Rules of Practice Governing Land Contests Approved by the Secretary of the Interior July 18, 1899.” In order that it may clearly appear that the action of the Department in the case of *Thlocco* has no semblance to a contest, we here set forth said rules:

“APPENDIX No. 9

RULES OF PRACTICE GOVERNING LAND CONTESTS
APPROVED BY THE SECRETARY OF THE
INTERIOR JULY 18, 1899.

Initiation of the Contest.

“ *Rule 1.* Contests must be initiated by an adverse claimant against a party to any application or filing under the laws of Congress relating to the lands of the Five Civilized Tribes, for any sufficient cause, affecting the right of possession of the land in controversy, by applying for the same land.

“ *Rule 2.* Contests must be initiated within ninety days from the date of the original application for the tract of land in controversy.

Pleadings.

“ *Rule 3.* The only pleadings allowed are:

“ *First.* The complaint.

“ *Second.* The answer or demurrer.

Complaint.

“ *Rule 4.* In every case of application for contest a complaint must be filed by the contestant with the Commission to the Five Civilized

Tribes, and at the land office in the nation in which the land lies.

“ *Rule 5.* The complaint must conform to the following requirements:

“ (a) It must be written or partly written and partly printed.

“ (b) It must describe the land involved.

“ (c) It must state the land office where and the date when such application was made.

“ (d) It must give the name of the contestee and the party for whom the contestee made the application.

“ (e) It must give the name of the contestant, and briefly and plainly state the grounds and purposes of the contest and the names of the persons for whom the contest is instituted.

“ (f) It may contain any other information pertinent to the contest.

“ (g) It must be duly verified.

Answer.

“ *Rule 6.* The answer or demurrer may be filed on or before the date set for hearing, and shall conform to the following requirements:

“ (a) It shall contain a denial of each allegation of the contestant controverted by the contestee.

“ (b) It shall contain a statement of any new matter constituting a defense, in ordinary and concise language without repetition.

“ (c) It must be written or partly written and partly printed.

- “ (d) It must describe the land involved.
- “ (e) It must state the land office where and the date when such application was made.
- “ (f) It must give the name of the contestant and the name of the persons for whom the contest was instituted.
- “ (g) It must give the name of the contestee and the party for whom the contestee made the application.
- “ (h) It may contain any other information pertinent to the contest.
- “ (i) It must be verified.

Notice.

“ *Rule 7.* At least twenty days' notice shall be given of all hearings before the Commission, unless by written consent an earlier day shall be agreed upon.

“ *Rule 8.* Summons and notice of contest of hearing must be made upon the blanks prepared and supplied by the Commission.

Service.

“ *Rule 9.* Personal service shall be made in all cases where the party to be served is a resident of Indian Territory, except as provided in rule 12, and shall consist of the delivery of a copy of the notice and summons to each of the contestees.

“ *Rule 10.* When the contest is against the heirs of a deceased applicant, the service shall be upon the executor or administrator of the estate.

“ *Rule 11.* If the person to be personally served is an infant under 16 years of age or a person of unsound mind, service shall be made by delivering a copy to the guardian of such infant or person of unsound mind, if there be one; if there be none, then by delivering a copy to the person having the infant or person of unsound mind in charge and also to the person who made the application for such person.

“ *Rule 12.* Personal service may be executed by any officer of the United States or any person.

“ *Rule 13.* Notice may be given by publication only when it is shown by affidavit of the contestant, and by such other evidence as the Commission may require, that due diligence has been used and that personal service cannot be made. The contestant will be required to show what effort has been made to obtain personal service.

“ *Rule 14.* Service by publication shall be made by advertising at least once a week for two successive weeks in some newspaper published in the Nation where the land in contest lies; and if no newspaper be published in such nation, then in the newspaper published nearest to such land.

“ *Rule 15.* The first insertion shall be at least twenty days prior to the day fixed for the hearing.

“ *Rule 16.* Where service is by publication, a copy of the notice shall be mailed by registered letter to the last known address of each person to be notified twenty days before date of hear-

ing, and a like copy shall be posted in the land office and in a conspicuous place on the land at least two weeks prior to the day set for hearing.

“ *Rule 17.* Proof of personal service shall be the written acknowledgment of the person served or the affidavit of the person who served the notice attached thereto, stating the time, place and manner of service.

“ *Rule 18.* When service is by publication, the proof of service shall be a copy of the advertisement with the affidavit of the publisher attached thereto, showing that the same was successively inserted the required number of times and the date thereof, and the affidavit of the person mailing the notice attached to the post office receipt for the registered letter.

Trials.

“ *Rule 19.* Upon the trial of a contest the Commission will in all cases, when deemed necessary, personally direct the examination of the witnesses, in order to draw from them all the facts within their knowledge requisite to a correct conclusion of any point connected with the case.

“ *Rule 20.* Due opportunity will be allowed opposing claimants and their counsel to confront and cross examine the witnesses introduced by either party.

“ *Rule 21.* A record will be kept of all proceedings at all the hearings and trials and of all the evidence adduced thereat.

Dismissals.

“ *Rule 22.* In cases dismissed for want of prosecution the Commission will, by registered letter, notify the parties in interest of such action.

“ *Rule 23.* Contests may be dismissed at any time by stipulation approved by the Commission.

Defaults.

“ *Rule 24.* Contestant will be given a default against contestee upon failure of the latter to appear and defend on the return day, after due service is shown to have been made, notice to be given to the defendant of said action by registered letter.

Continuance.

“ *Rule 25.* A postponement of a hearing to a date to be fixed by the Commission may be allowed on account of the absence of material witnesses when the party asking for the continuance makes an affidavit before the Commission showing:

- “(a) That one or more of the witnesses in his behalf is absent without his procurement or consent.
- “(b) The name and residence of such witnesses thus absent.
- “(c) The facts to which they would testify if present.
- “(d) Materiality of the evidence.

“(c) The exercise of proper diligence to secure the attendance of absent witnesses.

“(f) That affiant believes said witnesses can be had at the time to which it is sought to have the trial postponed.

“ *Rule 26.* One continuance only shall be allowed to either party on account of absent witnesses.

“ *Rule 27.* No continuance shall be granted when the opposite party shall admit that the witness would, if present, testify to the statements set out in application for a continuance.

Rehearings.

“ *Rule 28.* Motions for reinstatement, after dismissal as provided in Rules 22 and 24, and for rehearing and review, must be filed within ten days from notice of decision and be served upon the opposite party; and orders for rehearings must be brought to the notice of the parties in the same manner as in original proceedings.

Appeals.

“ *Rule 29.* Appeals from the final action or decision of the Commission lie, in every case, to the Commissioner of Indian Affairs, and from his decision to the Secretary of the Interior, and ten days will be allowed for appeal and argument from date of the receipt of notice of the decision in case of personal notice and twenty days in case of service by registered letter. All appeals must be served upon the opposite party within the time allowed for appeal and appellee shall have ten days for replying to appeal and

to serve the same. When an appeal is considered defective the party will be notified of the defect, and if not amended within ten days from notice, the appeal may be dismissed by the office to whom the appeal is taken. All notices will be served upon the attorney of record.

Attorneys.

“ *Rule 30.* Any attorney at law who desires to represent claimants or contestants before the Commission to the Five Civilized Tribes, must file a certificate under the seal of the United States, State, or Territorial Court of the judicial district in which he resides or the local land office is situated that he is an attorney in good standing. All attorneys practicing before the Department of the Interior must comply with the regulations of the Department. (See page 26, Rules of Practice, in cases before United States District Land offices.)

Witnesses.

“ *Rule 31.* All costs incident to the attendance of witnesses in proceedings instituted before the Land Office of the Commission to the Five Civilized Tribes shall be paid by the respective parties to the contest by whose request they have been summoned.”

We call particular attention to Rule 2, requiring that contests be initiated within ninety days from the original application for the land in controversy; Rule 7 requiring at least twenty days' notice of hearing to be given in all cases, and Rule 8, requiring

summons and notice of contest to be made on the blanks supplied by the Commission.

In Laws, Decisions and Regulations Affecting the Work of the Commission to the Five Civilized Tribes, 1893 to 1906, compiled by the Commission to the Five Civilized Tribes at Part IV, page 223, there appears under the caption "History of allotment contest cases," a complete schedule of the contest cases in the Five Civilized Tribes from which it will further appear that a "contest" is a proceeding between two claimants to the same allotment instituted in the manner required by the Secretary and tried somewhat in the fashion of a case in court after due notice.

In section 69 of the Cherokee Treaty, Act of July 1, 1902, it is provided: "After the expiration of nine months after the date of the original selection of an allotment by or for any citizen of the Cherokee Tribe as provided in this act, no contest shall be instituted against such selection, and as early thereafter as practicable patent shall issue therefor." Here we have a definition by Congress of an allotment contest which entirely excludes such *ex parte* proceeding as that had by the Department in this case.

At section 6 of the Original Creek Agreement, Act of March 1, 1901, "Curtis Bill" allotments were

confirmed by the provision: "All allotments made to Creek citizens by said Commission prior to the ratification of this agreement as to which there is no contests, and which do not include public property * * * are confirmed."

Construing said section 6, the Supreme Court, in *Woodward v. deGraffenreid*, 238 U. S. 284, 59 L. ed. 1310, 1328, said in discussing such "Curtis Bill" allotment where the allottee had died before the Original Creek Agreement:

" Under either of the views that we have expressed, the Agnes Hawes allotment, if it was uncontested, if it did not include public property, and was not otherwise affected by the Original Creek Agreement, was confirmed by Sec. 6. That it was not among the excepted classes is sufficiently evidenced by the subsequent action of the Dawes Commission in awarding it to the heirs of Agnes. That which had been tentative and provisional then became, by force of the provisions of the agreement, final and conclusive. The result was to vest a complete equitable title in her 'heirs' to be determined according to the Creek laws of descent and distribution; and, upon familiar principles, their interest, being vested, was not divested by the subsequent adoption of the Act of May 27, 1902, Chap. 888, effective July 1, 1902 (32 Stat. at L. 258; Joint Res. No. 24, 32 Stat. at L. 742), or the Supplemental Creek Agreement (Act of June 30, 1902, Chap.

1323. Sec. 6, 32 Stat. at L. 501, effective August 8, 1902, 32 Stat. at L. 2021), which substituted the Arkansas laws.”

So here that the allotment was not in contest is evidenced by the issuance and recordation of patent. Clearly this court meant in the *Woodward* case that the contest period ended with the award of the land to the heirs.

In the various annual reports of the Commission to the Five Civilized Tribes a history of the allotment contests in the Five Civilized Tribes is set forth and every reference to contests refers to the case of adverse claimants to the same land. See reports for the fiscal years ended as follows:

June 30, 1901, page 40;

June 30, 1903, page 56;

June 30, 1904, page 48;

June 30, 1905, page 54;

June 30, 1909, page 23;

June 30, 1910, page 21.

In all there were 10,951 such contests between citizens of the Five Tribes (report for year ended June 30, 1910, page 21).

The Commission in its report for the year ended June 30, 1905, at page 54, finds the purpose for which contests were permitted as follows:

“ Primarily such allotment contests were to insure each member of the tribe against the loss of improvements owned by him, but in many cases the real bone of contention is the supposed mineral value of the land.”

Continuing in said report for the year ended June 30, 1905, at page 55, the Commission gives the number of contests instituted in the Creek Nation from July 1, 1904, to June 30, 1905, the same being sixteen in number and then sets forth the history of all of these contests. It was August, 1904, when the Creek attorney addressed his letter to the Commission challenging the right of Thlocco to enrollment, but clearly this was not a contest nor did the Commission so treat it.

As to the scope of said proviso excepting said contested allotments from the operation of section 5, we easily reach the conclusion that the exception was inserted merely to protect contestants whose rights had not been passed upon finally by the Department.

The history of the *ex parte* action in Thlocco's case appears at pages 59 and 60, printed record.

Still maintaining that recordation of the patent prior to the Act of 1906 operated as delivery and passed the legal title by virtue of such recordation, we have yet assumed for the sake of argument in

the foregoing suggestions that such was not true until the passage of the Act of 1906, and so assuming, we unhesitatingly contend that such Act of 1906 was *retrospective* first, because *public necessity* required *to be so on account of the well known public history that there were many patents both to original allottees and to the heirs of such allottees where either the allottee nor the heirs could be found by the Dawes Commission in order to make delivery, and second, because unless such act is held to be retrospective there would be two classes, one class after 1906 where recordation of patent would be delivery and would pass legal title, and another class prior to 1906 where recordation would not pass title without delivery and acceptance would be necessary. Congress clearly never intended to give in this way one portion of the tribe an advantage over the other portion.*

F.

Assuming that legal title had not passed theretofore, it did pass under the Act of June 25, 1910.

Section 32, Act of June 25, 1910, 36 Stat. L. 863, provides:

“ Where deeds to tribal lands in the Five Civilized Tribes have been or may be issued, in pursuance of any tribal agreement or Act of

Congress, to a person who had died or who hereafter dies before the approval of such deed, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assigns of such deceased grantee as if the deed had issued to the deceased grantee during life."

This section only makes more clear and definite the meaning of the statutes theretofore enacted.

G.

If patent to Thlocco did not pass title to his heirs as a matter of law, the right thereto is equivalent to the patent, and equity will do that which ought to have been done, and will decree title to the heirs.

—*Stark v. Starr*, 6 Wall. 402, 18 L. ed. 925;

Godfrey v. Iowa Land & Trust Co., 21 Okla. 310, 95 Pac. 798;

Gaylord v. Carroll, (Ore.) 142 Pac. 357.

PROPOSITION FOUR.

THE UNITED STATES HAS NO PECUNIARY INTEREST IN THIS LITIGATION, THE ACTION BEING FOR THE BENEFIT OF THE CREEK NATION, AGAINST WHICH THE DOCTRINE OF LACHES APPLIES; THE GOVERNMENT IS ESTOPPED TO PROSECUTE THE ACTION.

While the defendants cannot plead *laches* against the United States in any matter where the government has either a property interest or a trust to perform, they should be heard to plead *laches* against the Creek Nation. The courts have held that the Creek Nation could not be sued, but it has not been held that the Creek Nation could not sue. If the Creek Nation had the right to maintain an action for the recovery of this land, and it did have such right, we apprehend then, it waited too long to assert its claim. The action by the government is entirely for the benefit of the tribe which still exists in legal contemplation only, however, for the purpose of winding up the tribal affairs. Barney Thlocco was enrolled May 24, 1901. After about fifteen years, when many of the witnesses have died or scattered, the government proposes to retry the question of fact already tried by the Dawes Commission. If this

was permitted, how much time must elapse before land titles in the east half of Oklahoma, formerly Indian Territory, will be settled? It is too late to put the heirs at trial on this issue. It appears that the unending curse of Eastern Oklahoma is unceasing litigation. Home seekers are afraid to buy Indian titles from which restrictions are removed. If the country is to prosper, if the Indians are to receive for their lands upon sale the money which their inherent value merits, titles must be quieted. We respectfully submit that it is not right for the government to stir up litigation of this sort upon the poor showing made in this case. The confusion in land titles is already quite unbearable. Certainly it should be held that time, if nothing else, has put this and similar matters at rest.

The case of *Folk v. United States*, by the Circuit Court of Appeals, Eighth Circuit, 233 Fed. 177, 191, is in point, where it was said:

“ This is a suit in equity. In such a suit the claims of the United States, or of the Creek Tribe, appeal to the conscience of the chancellor with the same, but with no greater or less, force than would those of a private citizen, and, barring the effect of mere delay, they are judiciable in a court of chancery, to whose jurisdiction the state or nation or tribe submits them by every principle and rule of equity applicable to the rights of private citizens under like circum-

stances. *State of Iowa v. Carr*, 191 Fed. 257, 266, 112 C. C. A. 477, 486; *United States v. Stinson*, 197 U. S. 200, 204, 205, 25 Sup. Ct. 426, 49 L. ed. 724; *United States v. Detroit Timber & Lumber Co.*, 67 C. C. A. 1, 10, 131 Fed. 668, 677; *United States v. Chicago, M. & St. P. Ry. Co.*, (C. C.) 172 Fed. 271, 276; *United States v. Chandler-Dunbar Water Power Co.*, 152 Fed. 25, 26, 27, 37, 38, 40, 41, 81 C. C. A. 221, 222, 223, 233, 234, 236, 237; *United States v. Stinson*, 125 Fed. 907, 910, 60 C. C. A. 615, 616; Herman on Estoppel, Secs. 676, 677; *State of Michigan v. Jackson, etc.*, 16 C. C. A. 345, 351, 69 Fed. 116, 122; *United States v. California & Oregon Land Co.*, 148 U. S. 31, 41, 13 Sup. Ct. 458, 37 L. ed. 354; *Carr v. United States*, 98 U. S. 433, 438, 25 L. ed. 209; *Walker v. United States*, (C. C.) 139 Fed. 409, 411, 412, 413.

“ The United States has no pecuniary interest in this litigation. The only pecuniary or property interest or equity in the plaintiffs is that of the Creek Tribe, and as the stream cannot rise higher than its source the equities of the United States are no greater and no less than those of the tribe. *United States v. Beebe*, 127 U. S. 338, 346, 8 Sup. Ct. 1083, 32 L. ed. 121; *French Republic v. Saratoga Vichy Co.*, 191 U. S. 427, 438, 24 Sup. Ct. 145, 48 L. ed. 247; *State of Iowa v. Carr*, 191 Fed. 257, 265, 266, 112 C. C. A. 477, 485, 486; *United States v. Detroit Timber & Lbr. Co.*, 131 Fed. 668, 678, 67 C. C. A. 1, 11; *LaClair v. United States*, (C. C.) 184 Fed. 128, 135, 136; *Mountain Copper Co. v. United States*,

142 Fed. 625, 629, 73 C. C. A. 621, 625; *Chesapeake & Delaware Canal Co. v. United States*, 223 Fed. 926, 929, 930, 139 C. C. A. 406, 409, 410, L. R. A. 1916B, 734. Even where equities are equal the defendant prevails. It is only when the case of the complainant appeals to the conscience of the chancellor with the greater force that he will interfere to grant relief, and in equity no one may successfully deny to the damage of another the truth of statements by which he has purposely or carelessly induced another to so change his situation that the assertion of the truth will irreparably or seriously injure him. *Hemmer v. United States*, 204 Fed. 898, 902, 123 C. C. A. 194, 198; *Town of St. Johnsbury v. Morrill*, 55 Vt. 165, 169; 2 Pomeroy's Equity Juris., Sec. 739; *Illinois Trust & Sav. Bank v. City of Arkansas City*, 76 Fed. 271, 293, 22 C. C. A. 171, 193, 34 L. R. A. 518; *Paxon v. Brown*, 61 Fed. 874, 881, 10 C. C. A. 135, 142; *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 51 Fed. 309, 326, 327, 2 C. C. A. 174, 191, 192.

“ The Creek Tribe made the Creek rolls of 1890 and 1895. By the Creek Agreement (31 Stat. 869, Sec. 28), which it made and ratified, the Creek Tribe contracted with the United States that the Dawes Commission should make the final roll of its citizens and allot them their lands, and that it should base that enrollment on the Creek tribal rolls of 1890 and 1895, and especially upon the latter. It had the opportunity and the privilege to correct and purge its rolls before the tribunal, and it must have had

more knowledge and more means of knowledge whether Thomas Atkins was rightly or wrongly enrolled when its tribal rolls were made, and thereafter, while the Commission was sitting, when the acquaintances of Minnie Atkins were living in the tribe and must have known the facts, than the tribe or its members have ever had since. Either purposely or carelessly it failed to correct its roll, if indeed that roll was erroneous, held that roll out to the Commission as correct in the regard here in question, thereby induced that Commission to enroll Thomas Atkins, purposely or carelessly held the Commission's roll out as correct, and permitted and induced thereby the allotment of this land to Thomas Atkins, the purchase and improvement of it by the defendants. Between making of these rolls from 1890 to 1902 and the commencement of this suit a great change in the value of the land, from a few dollars to many thousands of dollars, has occurred, witnesses who knew the facts 16 to 20 years ago must necessarily have died or disappeared, the memory of others has been dimmed with the passage of time, and this tribe first presents its claim that its rolls were fraudulent after all these events, more than 19 years after its last roll was made, and more than 12 years after the final roll of the Dawes Commission became a public record. The equities of the complainants fail to appeal to the conscience of this court with sufficient force to induce it to appoint a receiver for the property in the possession of the defendants, or to sustain the appointment or the injunction already made. The proof

in this case is neither clear nor convincing, nor satisfactory that it is probable that the plaintiffs will ultimately recover.”

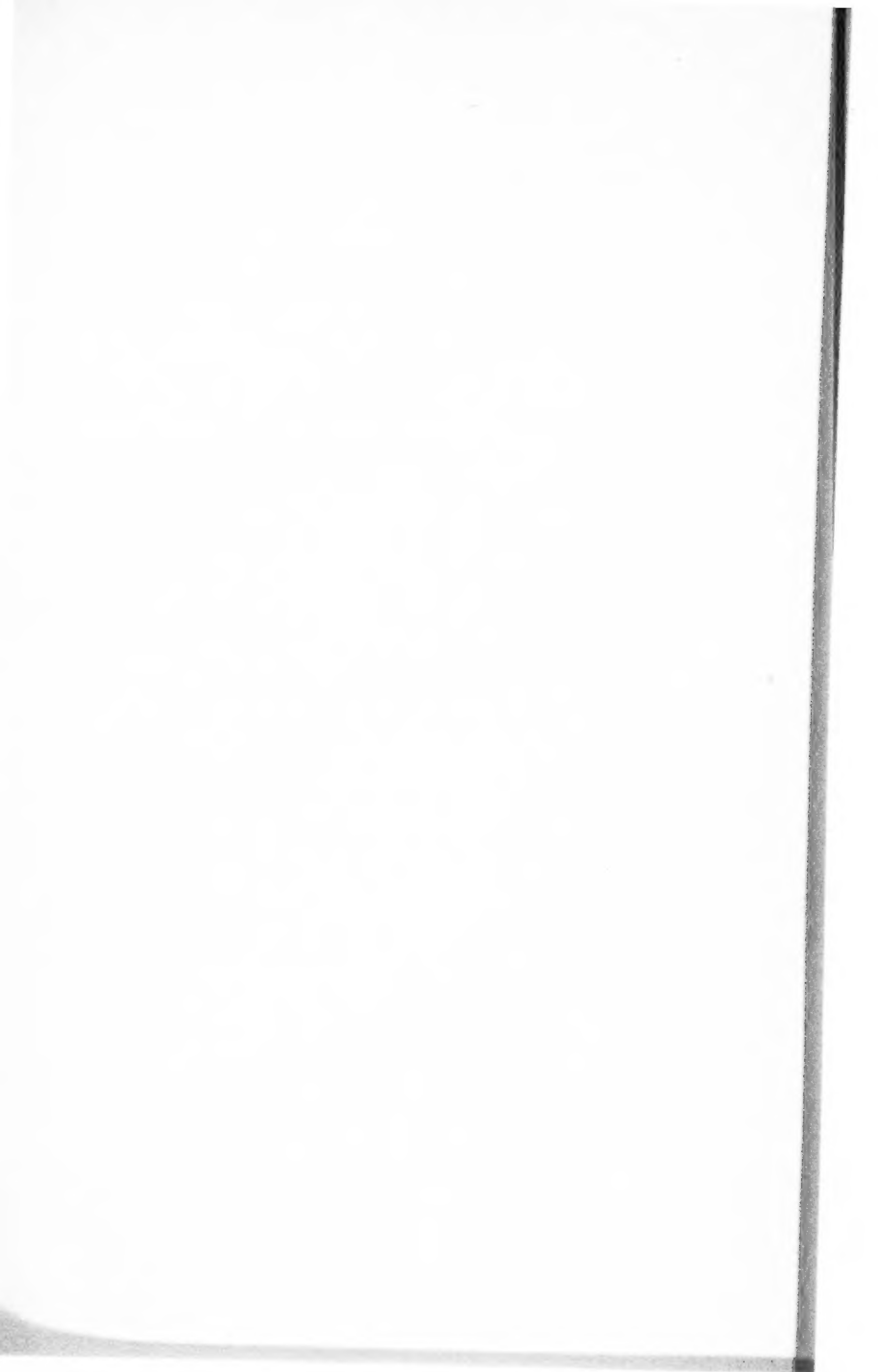
The trial court should be affirmed.

Respectfully submitted,

C. B. STUART,
A. C. CRUCE,
GEO. S. RAMSEY,
EDGAR A. DE MEULES,
MALCOLM E. ROSSEB,
VILLARD MARTIN,
JOHN DEVEREUX,
J. E. WYAND,
K. B. TURNER,
M. E. TURNER,
J. B. FURRY,
E. C. MOTTER,

P. J. CAREY,
W. C. FRANKLIN,
JOHN J. SHEA,
BURDETTE BLUE,
THOMAS F. SHEA,
WILLIAM A. COLLIER,
HAZEN GREEN,
E. J. VAN COURT,
CHAS A. MOON,
FRANCIS STEWART,
JOSEPH C. STONE,

Attorneys for Appellees.



UNITED STATES OF AMERICA.

DEPARTMENT OF THE INTERIOR.

Washington, D. C.,

March 29, 1917.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true and exact copy of the original as it appears of the records and files of this Department.

In Testimony Whereof, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

(Seal)
Department of
the Interior.

BO SWEENEY,
*Assistant Secretary
of the Interior.*

APPENDIX.

DEPARTMENT OF THE INTERIOR

WASHINGTON.

D-40271.

July 24, 1916.

In re Heirs of Jemima.

Application for Allotment in Creek Nation Denied.

DECISION.

This matter is before the Department on the recommendation of the Commissioner of Indian Affairs, under date of July 12, 1916, that the application filed herein for an allotment of land in the Creek Nation to the heirs of Jemima, be denied, and while the Department fully concurs in this recommendation, it is deemed advisable that a separate decision be rendered. Objections to the allowance of the application have been filed by various parties who claim through some of the alleged heirs of the deceased.

The Department is asked by the applicants to hold that an arbitrary allotment of land in the Creek Nation, certificate of allotment and deeds to which have been issued in the name of a duly enrolled but deceased member of said Indian tribe, is void, and it

is sought to have new deeds issued, conveying said land to the heirs of the deceased.

One Jemima was a duly enrolled full-blood citizen of the Creek Nation. She was living on the first of April, 1899, and there is no question of her right to an allotment of her distributive share of the lands of said tribe. She died some time in the fall of 1899 without, however, having selected an allotment, and no selection having been made by her heirs, the following described land was arbitrarily allotted in her name by the Commission to the Five Civilized Tribes, June 30, 1902:

S $\frac{1}{2}$ NE $\frac{1}{4}$, and lots 1 and 2, Sec. 3, T. 17 N., R. 7 E., situated in Creek County, State of Oklahoma, and containing approximately 161.57 acres.

This allotment was made pursuant to a resolution of said Commission, adopted May 24, 1902, which is as follows:

Muskogee, Indian Territory,
May 24, 1902.

A session of the Commission to the Five Civilized Tribes was held at its general office at Muskogee, Indian Territory, on the above date, there being present Commissioners Bixby, Needles and Breckenridge.

• • • • •

Whereas, section three of the Act of Con-

gress approved March 1, 1901 (31 Stat. 861), known as the Creek Agreement, provides that:

“ All lands of said tribe except as herein provided shall be allotted among the citizens of the tribe by said Commission so as to give to each citizen an equal share of the whole in value as nearly as may be,”

and that

“ * * * There shall be allotted to each citizen one hundred and sixty acres of land,”

and whereas, section seven of said act provides that

“ * * * each citizen shall select from his allotment forty acres of land as a homestead,”

and that

“ * * * if for any reason such selection shall not be made for any citizen, it shall be the duty of said Commission to make selection for him.”

And, whereas, numerous citizens of said nation have made no selection of land for allotment and others have made selection of only a portion of the land to which they are entitled, and

Whereas, after due notice given, many citizens of said nation have failed to make a selection of a homestead, therefore, be it

Resolved, That the acting chairman is hereby authorized and empowered by and on behalf of the Commission to allot to each citizen out of the lands of the Creek Nation not heretofore allotted or selected such an amount of land of at

least average quality as will make the total allotment of each citizen one hundred and sixty acres, and to select a homestead for such citizen in all cases where a selection of a homestead has not been made by or on behalf of said citizen:

Provided, That the allotment and selection of homestead so made for a citizen shall include improvements shown by the plats or records of the office to belong to said citizen.

On motion of Commissioner Breckenridge, duly seconded, the same was unanimously adopted.

• • • • •

There being no further business before the meeting the Commission on motion was adjourned.

TAMS BIXBY,

Attest:

Acting Chairman.

A. L. AYLESWORTH, *Secretary.*

Certificate of allotment duly issued and was delivered to one William Buck, who claimed to be a nephew of the deceased. Deeds to the homestead and surplus allotments were executed by the principal chief of the Creek Nation April 3, 1903, and approved by the Secretary of the Interior April 25, 1903. These deeds were recorded in the office of the then Commission to the Five Civilized Tribes, May 5, 1903, and on May 23, 1906, were delivered to said William Buck.

The present application purports to be filed on behalf of the heirs of Jemima, and is predicated upon the proposition that the allotment in question is void; that the land is part of the domain of the Creek Nation and therefore subject to selection by qualified citizens of said tribe. The contention that the allotment is void is based on the following grounds:

1. Because the allotment was arbitrarily made.
2. Because Jemima died prior to the time the allotment was made.
3. Because the deeds conveying said allotment were never delivered to Jemima or to her heirs.

Of course if the allotment was regularly and legally made, and the title to the land passed by virtue of the certificate of allotment and deeds of conveyance, the Department can exercise no further control over the title, and would be entirely without jurisdiction to grant the present application.

It was intended by the original Creek Agreement, ratified and confirmed by Congress by Act of March 1, 1901 (31 Stat. 681), as expressed in section 3, to allot to the eligible citizens of the Creek Nation—"all lands of said tribe, except as herein provided * * * so as to give each an equal share of the whole in value as nearly as may be." The manner of allotment is mentioned, and by section 45 it is

further provided that "all things necessary to carry into effect the provisions of this agreement, not otherwise herein specifically provided for, shall be done under authority and direction of the Secretary of the Interior." It was not the intention that one, or any number of Indians, should defeat the purpose of Congress to allot the lands in severalty by failing, or refusing to select their allotments. Opportunity was afforded each citizen to select the land desired by him, and it was specifically provided that the selection might be made so as to include his improvements, and notice was given citizens affected by the resolution of the Commission, above mentioned, and they were allowed 30 days within which to make their selections before arbitrary allotments were made; they were not deprived of the privilege of making selections, and the action of the Commissioner in making arbitrary allotment, so far from being without authority of law, was required in many cases in order to fully carry into effect the objects intended to be accomplished by the agreement and act referred to.

There is no merit in the contention that an allotment in the name of a deceased person is void. Section 32 of the Act of June 25, 1910 (36 Stat. 855), provides:

Where deeds to tribal lands in the Five Civilized Tribes have been or may be issued, in

pursuance of any tribal agreement or Act of Congress, to a person who had died, or who hereafter dies before the approval of such deed, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assigns of such deceased grantee as if the deed had issued to the deceased grantee during life.

The Supreme Court of the United States, in *Skelton v. Dill* (235 U. S. 206) said:

Whether an allotment of lands in the Creek Nation which was made on behalf of Archie Hamby, a Creek child then deceased, passed the lands to his heirs free from restrictions upon alienation is the federal question in this case. The facts out of which the question arises are these: Archie Hamby was born in February, 1900, and died in July, 1901, being survived by his parents and by at least one sister. His mother was a Creek woman, duly enrolled as such in 1895, and his father was a white man not entitled to enrollment. Two or three years after the child's death his name was regularly placed upon the roll of Creek citizens by the Commission to the Five Civilized Tribes, and the lands in question were duly embraced in an allotment made on his behalf. A deed for them was also issued in his name, and this, by operation of law vested the title in his heirs.

In the case of *Mullen v. United States* (224 U. S. 448, 456) the court said:

It is true that under the Creek agreement,

in cases where the ancestor dies before allotment, the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw agreement the allotment was to be made in the *name* of the deceased member and "descend to his heirs." This, however, is merely formal distinction and implies no difference in substance. In both cases the lands were to go immediately to the heirs.

In the supplemental memorandum filed on behalf of the applicants, it is suggested that amended or substitute deeds issue, to contain any appropriate clause to the effect that the same are issued merely for the purpose of validating the allotment heretofore made, and thus remove the legal objection that the same was made to a dead person. It is urged that all proper claimants would be protected thereby, and that such action could hurt no one. If the Department is correct in holding that there is no legal objection to an allotment to a dead person, there is no necessity for the issuance of substitute or amended deeds, and if this allotment is ever canceled by a court of competent jurisdiction, it will be time enough to consider this request then.

Since it appears, as above stated, that the deeds were delivered to William Buck, who claimed to be a nephew of the deceased, this fact sufficiently disposes of the question raised as to the invalidity of the allotment, on account of the alleged non-delivery of the

deeds to Jemima or her heirs, as it will be assumed that the officials charged with the execution of this duty properly performed the same.

From the foregoing, it will be seen that the allotment in question was legally made, but it is argued by the applicants that there must have been an acceptance of the deeds before title passed and the jurisdiction of the Department ends, and that herein lies the distinction between this case and those relating to the disposition of the public lands of the United States, wherein the courts have frequently held that upon the issuance and recordation of patent the control of the Department over the title to the land embraced therein ceases and it can only be attacked through appropriate action in the courts. In this connection it is sufficient to say that if acceptance is essential, ample proof thereof is found in the conduct of the present applicants in voluntarily intervening in an action now pending in the District Court of Creek County, Oklahoma, which involves the title to the land in question, and claiming title thereto by virtue of the issuance of the certificate and deeds above referred to.

The Circuit Court of Appeals of the 8th Circuit in speaking of the jurisdiction of the Commission to the Five Civilized Tribes in the issuance of allotment certificates and deeds to citizens of the Choctaw and

Chickasaw Nations, and the force and effect thereof, in the case of *Wallace v. Adams* (143 Fed. 716, 721) (affirmed by the Supreme Court of the United States in 204 U. S. 415), said, page 721:

The jurisdiction of the Commission and of the Secretary and the effect of their action in the allotment of the lands of the Choctaw and Chickasaw Nations are the same in effect as the jurisdiction and effect of the action of the Land Department of the United States in the disposition of the public lands within its control. The Commission under the direction of the Secretary constitutes a special tribunal vested with the judicial power to hear and determine the claims of all parties to allotments of these lands and to execute its judgment by the issue of the allotment certificates which constitute conveyances of the right to the lands to the parties who it decides are entitled to the property. This tribunal undoubtedly has exclusive jurisdiction to determine such claims and to issue such a conveyance. The allotment certificate, when issued, like a patent to land, is dual in its effect. It is an adjudication of the special tribunal, empowered to decide the question, that the party to whom it issues is entitled to the land, and it is a conveyance of the right to this title to the allottee. *U. S. v. Winona & St. Peter R. Co.*, 15 C. C. A. 96, 103, 67 Fed. 948, 955. Like a patent, it is impervious to collateral attack. But, as in the case of a patent, if the Commission or the Secretary has been induced to issue the allotment certificate to the wrong party by an erroneous view of the law, or by a gross or fraudulent mistake of the facts,

the rightful claimant is not remediless. He may avoid the decision and charge the legal title to the lands in the hands of the allottee, as he may that of the grant to a patentee, with his equitable right to it either on the ground that upon the facts found, conceded, or established without dispute at the hearing before the special tribunal, its officers fell into an error in the construction of the law applicable to the case which caused them to refuse to issue the certificate to him and to give it to another, or that through fraud or gross mistake it fell into a misapprehension of the facts proved before it which had a like effect. *James v. Germania Iron Co.*, 46 C. C. A. 476, 479, 107 Fed. 597, 600.

In the case of *United States v. Dowden* (220 Fed. 277) the court said (syllabus):

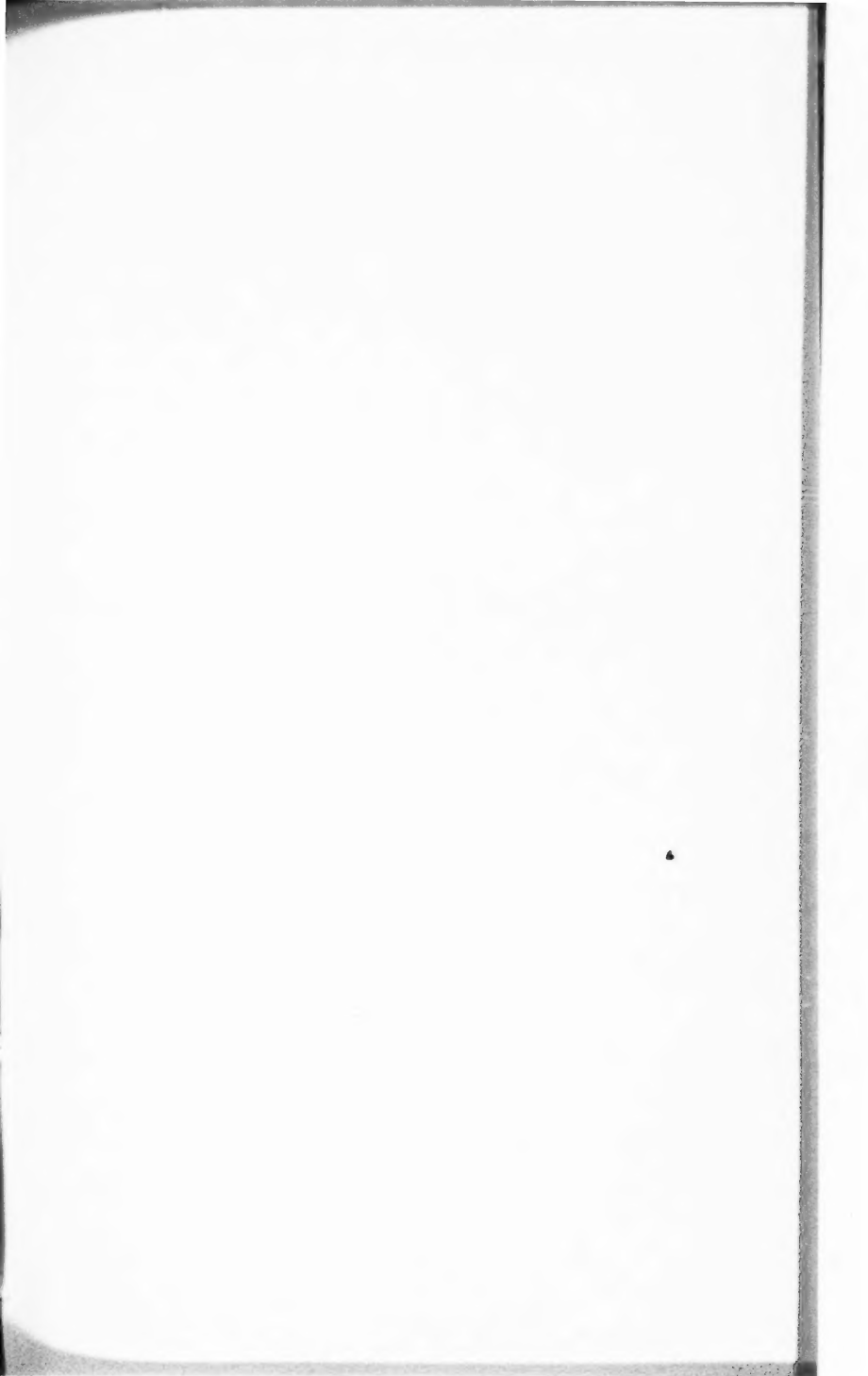
The selection of an allotment of land by a member of the Chickasaw or Choctaw Tribe of Indians, and the issuance of a certificate of allotment therefor by the Commission to the Five Civilized Tribes, pursuant to statute, vest the allottee with an absolute right to a patent, which may be enforced in the courts, and the Secretary of the Interior has no power to thereafter cancel the allotment and segregate the land for a town-site.

It is too well settled to admit of doubt, or necessitate the citation of authorities, that upon the issuance and recordation of patent to public land, this Department's jurisdiction and control over the same

is at an end, and since its jurisdiction is the same in effect as to the issuance of final certificates and allotment deeds to members of the Five Civilized Tribes, it follows that it has no jurisdiction to exercise further control over the title to the land herein involved, unless and until the allotment is canceled in a court of competent jurisdiction.

The application is, therefore, denied.

(Signed) ANDRIEUS A. JONES,
First Assistant Secretary.



In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES	} No. 741.
v.	
BESSIE WILDCAT, A MINOR, ET AL.	

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, and respectfully moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

This is a suit in equity brought by the United States in the District Court of the United States for the Eastern District of Oklahoma against the heirs of one Barney Thlocco, a full-blood Creek Indian, to obtain cancellation of the allotment certificate and deeds for his allotment of 160 acres of land made to Thlocco under the agreement with the Creek Nation providing for the enrollment of all citizens of that nation living on the 1st day of April, 1899, for the purpose of allotting to them certain lands. Relief was prayed on the grounds—

1. That Thlocco died prior to April 1, 1899;
2. That the Dawes Commission, created by the agreement with the Creek Nation, in entering Thloc-

co's name on the tribal roll and causing the land to be conveyed to him, acted under a mistake of law and fact, as well as arbitrarily, and without evidence that Thlocco was living on April 1, 1899; and

3. That the certificate of allotment and deeds to Thlocco were null and void because made to a dead man.

At the trial of the case in the District Court the Government offered to show that Thlocco in fact died in the month of January, 1899; also, that subsequent to the approval by the Secretary of the Interior of Thlocco's enrollment, that officer directed a reopening of the enrollment of Thlocco as well as a rehearing before the Dawes Commission therein, that such rehearing was had and the Secretary of the Interior, on recommendation of the commission, further directed that Thlocco's name be stricken from the tribal roll, which was accordingly done.

The District Court restricted the United States to showing that the Dawes Commission acted in Thlocco's case wholly without evidence, and in dismissing the bill held that the action of that commission was a judicial act and final unless it be alleged and proven that its action was procured by fraud or misrepresentation. An appeal was taken by the Government to the Circuit Court of Appeals for the Eighth Circuit, which has certified to this court the following questions:

I. Should the evidence offered by the Government to show that Thlocco died prior to April 1, 1899, have been admitted?

. Should the evidence offered by the Government to show that Thlocco's enrollment was cancelled by the Dawes Commission have been admitted?
I. Were the certificate of enrollment and deeds Thlocco null and void because he was dead at the time they were made?

Like questions are involved in a number of other cases now pending, and as the answers made herein this court will determine the disposition of those cases, an early solution of the questions presented is desirable.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

DECEMBER, 1916.

○

WILLIAM J. HARRIS, CLERK
U. S. SUPREME COURT
RECEIVED
OCT 10 1916
JAMES D. HARRIS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 741.

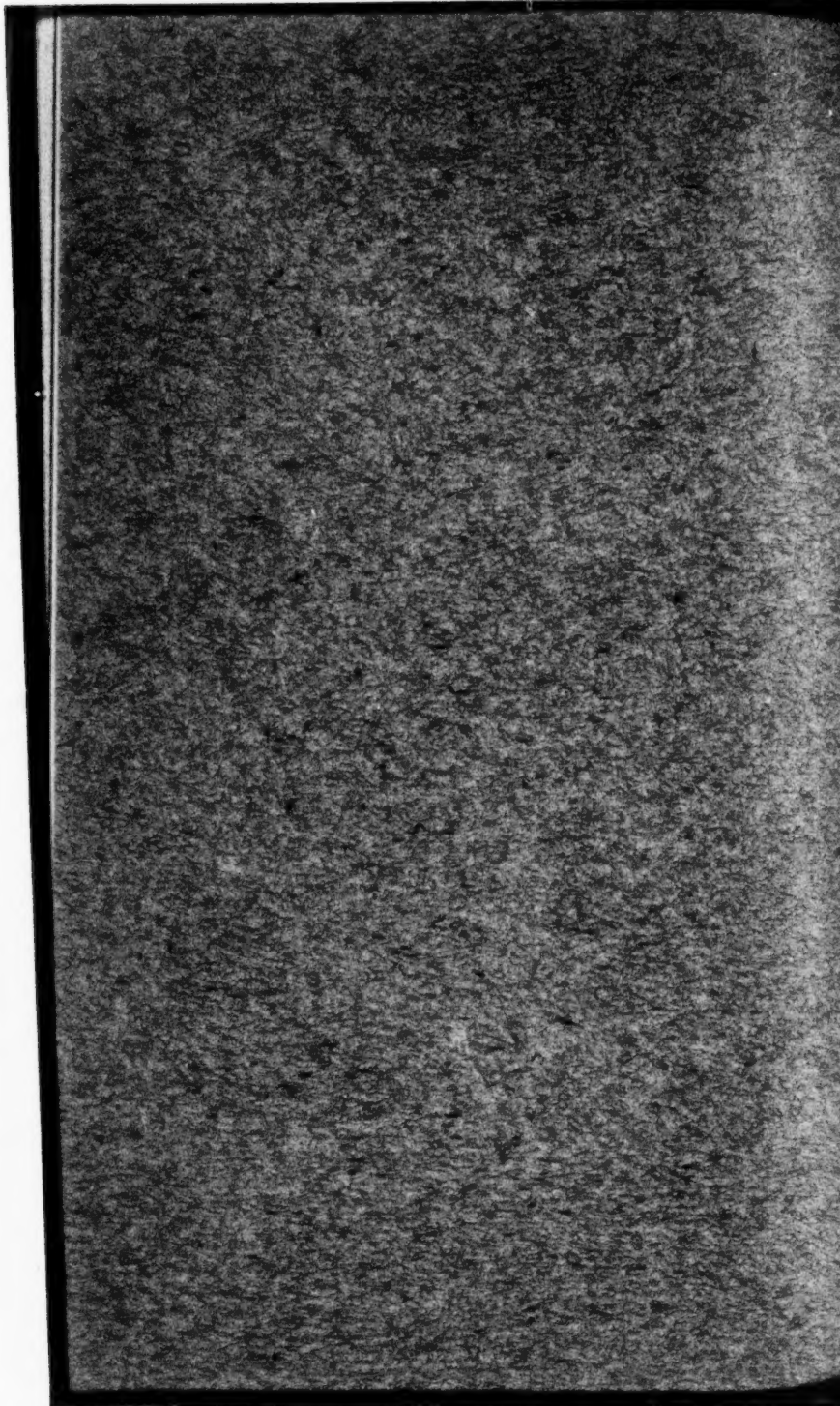
THE UNITED STATES

BESSIE WILCOAT, A MINOR, ET AL.

**ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

**APPLICATION FOR THE WHOLE RECORD AND CAUSE
TO BE SENT UP TO THE SUPREME COURT FOR ITS
CONSIDERATION**

CHARLES B. STUART,
Oklahoma City, Oklahoma.
JOHN J. SHEA,
Bartlesville, Oklahoma.
JOSEPH C. STONE,
Muskogee, Oklahoma.
Attorneys for Applicants.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 741.

THE UNITED STATES

vs.

BESSIE WILDCAT, A MINOR, ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

**APPLICATION FOR THE WHOLE RECORD AND CAUSE
TO BE SENT UP TO THE SUPREME COURT FOR ITS
CONSIDERATION.**

To the Honorable Supreme Court of the United States:

The application of Bessie Wildcat, a minor; Santa Watson, as guardian of Bessie Wildcat, a minor; Cinda Lowe, Louisa Fife, Annie Wildcat, Emma West, Martha Jackson, a minor; Saber Jackson, as guardian and next friend of Martha Jackson, a minor; J. Coody Johnson, Aggie Marshall, Phillip Marshall, H. B. Beeler, Max H. Cohn, Black Panther Oil & Gas Company, a corporation; Jack Gouge, Ernest Gouge, Mat-

tie Bruner, formerly Mattie Phillips, Jennie Phillips, Billie Phillips, D. L. Berryhill, William McCombs, Barney Unussee, Barnossee Unussee, Fullholchee Barney, Tommy Barney, Mollie Barney, Tony Chupko, Joseph Chupko, James C. Chupko, Eddie Larney, Polly Yargee, Sarkarye Chupko, Dick Larney, Moser Chupko, Tommy Chupko, Linda Harjo, Mary Jones, Loley Cooper, Celia Yahola, Charles S. Smith, Nora Watson, a minor; John Smith, Lewis Smith, Lawrence Smith, Guy Smith, Ella Looney, née Smith; Edna Pike, née Smith; Pearle Smith, Willis Smith, a minor; J. S. Tilly, guardian of Willis Smith, a minor; Rannie Smith, Elizabeth Rhyne, née Smith; Rashie C. Smith, Montie Nunn, née Smith; Lou Smith, Howard Weber, Sabar Jackson, Martha Simmons, Hannah Bullette, Robert Owen Burton, Nathaniel Mack Burton, Lydia Belle Wilson, née Burton; Samuel L. Burton, Abi L. Miller, née Burton; Minnie Ola Edwards, née Burton, and Mary Eliza Burton, respectfully shows to this honorable court that the whole record and this cause should be sent up to the Supreme Court for its consideration for the following reasons, to wit:

First. Because of the magnitude, gravity, and importance of the questions involved. This is a suit by the United States on behalf of the Creek Nation against the heirs of Barney Thlocco, a Creek Indian, to obtain cancellation of the allotment certificate and patents to his 160-acre allotment upon the alleged grounds (1) that Thlocco died prior to April 1, 1899, to wit, in the month of January of that year (31 Stat. at L., 861, 869, provides for the enrollment of all citizens of the Creek Nation, who were living on the first day of April, 1899); (2) that the Dawes Commission in entering his name upon the tribal roll and in causing the allotment to be conveyed to him acted under gross mistake of fact and law and arbitrarily and without evidence as to whether Thlocco was living April 1, 1899 (no charge of fraud is made); (3) that the certificate of allotment and deeds to Thlocco are void because made in the name of a dead man.

The three questions presented by the certificate are:

1. Should the evidence offered by the Government to show that Thlocco died prior to April 1, 1899, have been admitted?

2. Should the evidence offered by the Government to show that Thlocco's enrollment was cancelled by the Dawes Commission have been admitted?

3. Were the certificate of enrollment and deeds to Thlocco null and void because he was dead at the time they were made?

The trial court decided all these questions against the Government.

The Dawes Commission enrolled about 102,000 persons in the Five Civilized Tribes, of which about 18,000 were Creek Indians, and allotted to said 102,000 citizens of the Five Civilized Tribes almost all of the lands of said tribes, the same constituting practically the entire east half of the State of Oklahoma. The Circuit Court of Appeals found that there are "many thousands of identical cases" (Printed Certificate, p. 4). Therefore, the questions involved in this case will be decisive of many similar cases. The trial court on this point held as follows: "In my judgment, if the contention of the Government is sound, it means that these thousands of allotments and patents which have been issued here upon the faith of the enrollment of the Commission to the Five Civilized Tribes of these Indians can now be attacked and set aside by actions of this court merely upon a showing that the Commission, although finding, for instance in the case of the Creek Nation, that the allottee, was living April 1, 1899, made a mistake, and that inasmuch as they made that mistake it devolved upon this court to retry that issue" (Record, p. 110).

A clear and comprehensive history of how enrollment and allotment were made appears in the certified record herein offered, such as the testimony of the Honorable Tams Bixby, Commissioner (Record, p. 94), and the testimony of Edward Merrick, the enrolling clerk, who wrote the census card of Barney Thlocco (Record, p. 66), which history of enrollment and allotment is necessary to a proper understanding of the manner in which enrollment was made and allotments set aside to the individual Indians. All the evidence in the record was offered by the Government. The court dismissed the bill because the complainant did not make a case. This application, therefore, seeks to take up the record as made by the United States.

Second. Because the honorable the United States Circuit Court of Appeals for the Eighth Circuit, we respectfully submit, did not properly find in the certificate one fundamental fact which is necessary to the determination of said question No. 2, in this, to wit: Said court did not find that the attempted cancellation of the enrollment of Thlocco was without any notice to his heirs. It is shown by the pleadings (Record, p. 33), by admissions at the trial (Record, p. 42), and elsewhere in the record, that said proceeding in its entirety was without any notice to the heirs, for which reason the appellees contend that said attempted cancellation was void, relying upon the rule in *Garfield vs. United States ex Rel. Goldsby*, 211 U. S., 255; 53 L. Ed., 168. As late as February 17, 1911, the Government commenced a suit against the "Unknown Heirs of Barney Thlocco," not having up to that time discovered any of them (Record, p. 116). For want of a finding upon this ultimate and fundamental fact, this honorable court cannot properly pass upon said question No. 2 except upon the bringing up of the entire record and the whole case.

Wherefore said applicants herewith tender a duly certi

fied copy of the entire record of said case, and most respectfully pray that the whole record and cause be sent to the Supreme Court for its consideration and determination.

CHARLES B. STUART,
JOHN J. SHEA,
JOSEPH C. STONE,
Attorneys for said Applicants.

THE UNITED STATES OF AMERICA

BEFORE ME, the undersigned authority, on this day personally appeared _____

ON A CERTAIN DAY OF _____

Read and approved of the foregoing _____

In the
SUPREME COURT OF THE UNITED STATES.
October Term, 1916.

No. 741.

THE UNITED STATES, - - - - - Appellant,

vs.

BESSIE WILDCAT, a Minor, et al., - - Appellees.

INDEX.

PROPOSITIONS DISCUSSED.

(page

An examination of all the statutes in pari materia shows that section 5 of the Act of April 26, 1906 (34 Stat. L. 137), was not intended to operate in the manner claimed for it by appellees 4

This case is not controlled by decisions as to the public land laws, and delivery of the patents was necessary to pass title12

At the time the allotment was made Barney Thlocco was dead and hence the allotment was void and vested no title in his heirs19

It was the duty of the Secretary to correct errors in enrollment and he was vested with authority until March 4, 1907.31

The resolution adopted by the Commission to the Five Civilized Tribes on May 24th, 1902, under which the arbitrary selection for allotment was made for Barney Thlocco on June 30, 1902, is without authority of law, and the acts thereunder are void36

INDEX—CONTINUED.

STATUTES QUOTED.

	(pages)
Act of April 26, 1906 (34 Stat. L. 137)	3, 4, 6, 10, 30
Act of March 1, 1901 (31 Stat. L. 861)—Creek Agreement	7, 13, 19, 39, 45, 57
Act of July 1, 1902 (32 Stat. L. 641)—Choctaw-Chickasaw Agreement	7, 14
Act of July 1, 1902 (32 Stat. L. 716)—Cherokee Agreement	9

TABLE OF CASES CITED.

Baker v. Lane, 82 Kan. 715	26
Choate v. Trapp, 224 U. S. 665	14
Cherokee Nation v. Whitmire, 233 U. S. 108	34
Daniels v. Wagner, 237 U. S. 547	44
Hunter v. Watson, 12 Cal. 363	27
Kohlsaat v. Murphy, 96 U. S. 153	6
LaRoque v. U. S., 239 U. S. 62	23
Lowe v. Fisher, 223 U. S. 95	2, 32
Lynch v. Franklin, 233 U. S. 269	23
Neal v. Nelson, 117 N. C. 393	28
Malone v. Alderdice, 212 Fed. 671	50
Major v. Thompson (Dawes Commission)	17
Moffatt v. U. S., 112 U. S. 31	24
Morgan v. Hazelhurst, 53 Miss. 665	27
Morris v. United States, 174 U. S. 196	52
Skelton v. Dill, 235 U. S. 206	29
Slizemore v. Brady, 235 U. S. 441	13, 19, 21, 52
United States v. Hawkins, 217 Fed. 11	24, 26
United States v. Jacobs, 197 Fed. 707	24
Williams v. Johnson, 239 U. S. 414	16
Woodward v. deGraffenreid, 238 U. S. 234	50

In the
SUPREME COURT OF THE UNITED STATES.
October Term, 1916.

No. 741.

THE UNITED STATES, - - - - - *Appellant,*

vs.

BESSIE WILDCAT, a Minor, *et al.*, - - *Appellees.*

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT OF GRANT FOREMAN
AND JAMES D. SIMMS AS *AMICI CURIÆ*.

The object of the contention, no doubt, is to
clear the way for the ultimate contention upon which
their case must rest—the want of power of the Sec-
retary of the Interior over rolls which he had once ap-

proved, and after having issued certificates of allotments to the enrolled Indians.

The above language is taken from the opinion of this court in the case of *Lowe v. Fisher*, 223 U. S. 95, where the court held that the Secretary was invested with authority to revise and correct the rolls made under his supervision until March 4, 1907; and is employed by us here to state briefly the contention which we understand is being made in this case. We believe the government should prevail in this suit, and that the three questions certified by the Circuit Court of Appeals for the Eighth Circuit should all be answered by this court in the affirmative; and we shall make a brief argument in support of this view upon the following propositions:

One.

Questions one and two should be answered in the affirmative because Congress reposed with the Interior Department jurisdiction to correct the rolls, even though theretofore approved, and this authority was necessary in order that the Department might properly perform the duties reposed in it.

Two.

Question number three should be answered in the affirmative in view of the law upon the subject.

It is urged that the Government was without authority to cancel the enrollment of Barney Thlocco on December 13, 1906, and is now without authority to cancel the allotment made to Barney Thlocco for the reason that by said allotment and the issuance and recording of the patents conveying the allotted land to Barney Thlocco on April 3, 1902, and the enactment of section 5 of the Act of April 26, 1906, the title had completely vested and the whole subject matter was removed from further inquiry by the Secretary of the Interior. This contention rests on the claim, that whether Barney Thlocco was rightfully enrolled or not, the decision of the Commission upon that point was beyond recall or examination because of the operation of section 5 of the Act of April 26, 1906, upon the patents theretofore issued and recorded.

It is contended on the part of the Government that as the patents have never been delivered and are still in the office of the Department, title has not passed and that section 5 of the Act of April 26, 1906, did not have the effect claimed for it. This section reads as follows:

“ That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and

if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect; and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same: *Provided*, The provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior at the date of the approval of this act."

An examination of all the statutes in *pari materia* shows that this section was not intended to operate in the manner claimed for it by appellees.

In our judgment this section was intended to provide for the issuance and delivery of patents in the right of allottees who had died before receiving them; the section still required delivery to the party *entitled* to receive the patents. That Congress found

it necessary to provide for the allotment of lands in the names of deceased members is the strongest legislative construction of prior legislation upon the subject, that no authority theretofore existed for making allotments in the names of deceased Creek members; and in the language which says that when the patents are recorded they "shall convey legal title" the purpose was to vest the legal title in the holder of the equitable title which had vested by reason of selection prior to the death of the allottee. It was intended further to provide a means by which the legal title would vest in the vendees of allotted land conveyed by the allottee who died before receiving his patent.

But it is claimed, notwithstanding Barney Thloco may not have been entitled to be enrolled, the patents so issued and recorded vested the title by virtue of this section. That is to say that the purpose of Congress and the tribe to provide for enrollment of and allotment to those *only* who were qualified by certain tests, is to be defeated by the application of this section.

We contend that this section is to be construed with all the other legislation bearing on the subject of allotment of the lands of the Five Civilized Tribes in order that its meaning and application may be understood; and that title was intended to pass under

this section only in the event that those claiming were entitled by all of the legislation upon the subject. In the case of *Sizemore v. Brady*, 235 U. S. 441, this court said in speaking of the Creek Agreement:

“It contemplated that various preliminary acts were to precede any investiture of individual rights. The lands and funds to which it related were tribal property, and only as it was carried into effect were individual claims to be fastened upon them.”

Only in the event, therefore, that the enrollment and allotment of Barney Thlocco conform to law was it possible for title to vest in him or his heirs. Application of section 5 of the Act of April 26, 1906, is to be ascertained by considering all of the other statutes upon this subject. It is well established by this court that all statutes in *pari materia* are to be considered in construing their intention and application.

In the case of *Kohlsaat v. Murphy*, 96 U. S. 1. c. 153, this court said:

“ In the exposition of statutes, the established rule is that the intention of the law-maker is to be deduced from a view of the whole statute, and every material part of the same; and where there are several statutes relating to the same subject, they are all to be taken together, and one part compared with another in the construction of any one of the material provisions,

because, in the absence of contradictory or inconsistent provisions, they are supposed to have the same object and as pertaining to the same system. Resort may be had to every part of a statute, or, where there is more than one in *pari materia*, to the whole system, for the purpose of collecting the legislative intention, which is the important inquiry in all cases where provisions are ambiguous or inconsistent.”

In their general aspect the plans for allotting the lands of the different tribes were similar. They all provided for allotments to be made to the lawfully enrolled members of the tribe, and subsequently deeds or patents running to the allottees or to their heirs were to be executed and delivered to those *entitled* to receive them, whereby the legal title was to vest. The work of the Commission concerning the Creeks was much in advance of that in the other tribes; legislation covering the subject of allotment, delivery of deeds and passing of title was enacted for the Creeks March 1, 1901, more than a year before that for the other tribes (31 Stat. 861).

On July 1, 1902, Congress enacted the Choctaw-Chickasaw Agreement (32 Stat. 641), sections 11 to 24 of which cover the subject of allotment. Sections 27 to 44 cover the subject of enrollment. It was provided that allotments should be made only to those members of the tribes who were enrolled and living

on the date of the ratification of the agreement. Section 35 of the act provided as follows:

“ No person whose name does not appear upon the rolls prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Choctaw and Chickasaw tribes, and those whose names appear thereon shall participate in the manner set forth in this agreement: *Provided, That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person whose name is on the said rolls, and who died prior to the date of the final ratification of this agreement. The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before the date of the final ratification of this agreement, and any person or persons who may conceal the death of anyone on said rolls as aforesaid, for the purpose of profiting by the said concealment, and who shall knowingly receive any portion of any land or other tribal property, or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense, shall be confinement at hard labor for a period of not less than one year nor more than five years, and in addition thereto, a forfeiture to the Choctaw and Chickasaw Nations of the lands, other tribal property, and proceeds so obtained.*”

Similar legislation was had for the Cherokee Nation on July 1, 1902 (32 Stat. 716), wherein it provided in sections 11 to 23 and 25 to 31 for enrollment of and allotment to those members of the tribe who were entitled and who were living on September 1, 1902. Section 31 provided as follows:

“ No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act: *Provided, That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on said roll and who died prior to the first day of September, nineteen hundred and two. The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before said date, and any person or persons who may conceal the death of anyone on said roll as aforesaid for the purpose of profiting by said concealment, and who shall knowingly receive any portion of any land or other tribal property or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense shall be confinement at hard labor for a period of not less than one year nor more than*

five years, and in addition thereto a forfeiture to the Cherokee Nation of the lands, other tribal property, and proceeds so obtained.”

In the three tribes therefore—the Cherokee, Choctaw and Chickasaw—Congress in the most definite terms had provided against the possibility of any member claiming rights as heir of a deceased allottee where by fraud or inadvertence, mistake or lack of information on the part of the executive officers, as in the case of Barney Thlocco, they had made an allotment to one who was not living on the date necessary to *entitle him or his heirs* to an allotment. Congress made it a crime for such heirs to conceal the date of the death and to claim title to land so allotted.

Can it be said then that section 5 of the Act of 1906 meant that the recording of the patent would pass title to heirs, who would be criminally liable for claiming any benefit thereby?

It is clear that section 5 of the Act of April 26, 1906, applies to all of the Five Civilized Tribes and yet if the contention of counsel for those claiming under the alleged heirs of Barney Thlocco is correct, this section would have the effect of vesting title in persons in the Cherokee, Choctaw and Chickasaw nations who are criminally liable for accepting or claim-

ing the benefits of these titles. It is true that this inhibition against claiming title which does not legally emanate is not to be found in the Creek Agreement, but that in no way militates against the argument that Congress did not intend by the Act of 1906 to vest an irrevocable title in those of the Creek Nation who were by prior legislation denied the right to claim such titles. These various provisions of the law must be considered as parts of a uniform and harmonious body of legislation bearing upon one subject, and only when they are so considered is it possible to ascertain the intention of Congress as disclosed by the various statutes. These inhibitions contained in the Cherokee, Choctaw and Chickasaw agreements, illuminate with a strong light the fixed purpose of Congress to limit allotments to those only who meet the tests prescribed and by the most unequivocal terms charge the Secretary to perform the duties so imposed upon him in strict compliance with the law. How can he obey if he is not to correct the inevitable errors that must creep into this huge undertaking? To say that an exception of these requirements is to be permitted in the Creek Nation is entirely unwarranted.

In the certificate of the Circuit Court of Appeals in this case, it is stated:

“ The Dawes Commission did not treat the rolls as final after their approval. One thou-

sand four hundred forty-seven (1447) names were cancelled from the final rolls of the Choctaw and Chickasaw Nations after their approval by the Secretary. *This was done because these persons, after their final enrollment, were discovered to have died prior to the date fixed by the statute.* There hundred fifty (350) names were stricken from the Cherokee roll at one time for the same reason. Many names were cancelled from the Creek roll upon the same grounds."

If the Secretary had authority to correct errors and cancel from the rolls all of these persons because they did not meet the requirements of the law, he had authority to cancel the allotment of Barney Thlocco, for the same reason. But if he exceeded his authority in his action with reference to Barney Thlocco, then the hundreds and perhaps thousands mentioned above, who were stricken from the approved rolls are entitled to be heard upon the contention that they should be reinstated on the rolls.

This case is not controlled by decisions as to the public land laws, and delivery of the patents was necessary to pass title.

It is contended by counsel representing the grantees of the alleged heirs of Barney Thlocco that the Secretary of the Interior, with reference to these lands, occupies a position similar to that which he

would occupy to them if they were public lands of the United States and that it is immaterial that delivery of the patents to Barney Thlocco has never been made. We contend that this view of the matter is incorrect; that there is a vast distinction between Indian land and public lands and that only when the injunction of this court in the *Sizemore v. Brady* case (235 U. S. 441) has been observed does title pass; the language to which we refer is that "the lands and funds to which it (the Creek Agreement) relates were tribal property and only as it was carried into effect were individual claims to be fastened upon them."

The patents conveying the allotment to Barney Thlocco were never delivered or accepted by anyone and they are now in the office of the Superintendent at Muskogee. Section 23 of the Act of March 1, 1901, provides in part as follows:

" Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal chief shall thereupon proceed to execute in due form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands

as may have been selected by him for equalization of his allotment. * * *

“ All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title and interest of the United States in and to the lands embraced in his deed.

“ Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title and interest in and to the same, except in the proceeds of lands reserved from allotment.

“ The acceptance of deeds of minors and incompetents, by persons authorized to select their allotments for them, shall be deemed sufficient to bind such minors and incompetents to allotment and conveyance of all other lands of the tribe, as provided herein.”

Provisions similar to those of section 23 of the Creek Agreement, by which the allottee agrees to the terms of the allotment, are found in the legislation referring to the allotment of the Choctaw and Chickasaw lands (30 Stat. L. 541, 32 Stat. L. 641). The United States Supreme Court, in *Choate v. Trapp*, 224 U. S. 665, said of this provision (the Atoka Agreement):

“ The individual Indian had no title or enforceable right in the tribal property. But as one

of those entitled to occupy the land he did have an equitable interest which Congress recognized and which it desired to have satisfied and extinguished. The Curtis Act was framed with a view of having every such claim satisfactorily settled. *And though it provided for a division of the land in severalty, it offered a patent of non-taxable land ONLY to those who would relinquish their claim to the other property of the tribe formerly held for their common use. For the Atoka Agreement, after declaring that 'all lands allotted should be non-taxable,' stipulated further that each enrolled member of the tribe should receive a patent framed in conformity with the agreement, and that each Choctaw and Chickasaw who accepted such patent should be held thereby to assent to the terms of this agreement, and to relinquish all of his right in the property formerly held in common.*

“ There was here, then, an offer of non-taxable land. Acceptance by the party to whom the offer was made, with the consequent relinquishment of all claims to other lands, furnished a part of the consideration, if, indeed, any was needed, in such a case, to support either the grant or the exemption. *Wisconsin & M. R. Co. v. Powers*, 191 U. S. 386; *Home of the Friendless v. Rouse*, 8 Wall. 437; *Tomlinson v. Jessup*, 15 Wall. 458. *Upon delivery of the patent the agreement was executed, and the Indian was thereby vested with all the right conveyed by the patent, and like a grantee in a deed poll, or a person accepting a conveyance, bound by its terms, al-*

though it was not actually signed by him. Keller v. Ashford, 133 U. S. 621; Hendrick v. Lindsay, 93 U. S. 143.

"As the plaintiffs were offered the allotment on the conditions proposed; as they accepted the terms, and, in the relinquishment of their claim, furnished a consideration which was sufficient to entitle them to enforce whatever rights were conferred, we are brought to a consideration of the question as to what those rights were."

The principle announced in this case was referred to as authority by this court in the case of *Williams v. Johnson*, 239 U. S. 414.

Title vested in the members of the tribe only when the Commission acted according to law as was said by this court in the case of *Sizemore v. Brady*; that the delivery and acceptance of the patents was necessary to pass title has been recognized not only in the courts but by the very highest authority in the Department of the Interior. The first expression upon that subject with which we are familiar was that contained in the opinion of Assistant Attorney General VAN DEVANTER, dated April 24, 1902. This opinion was prepared for the Secretary of the Interior, and the question under consideration was, when the title passed to a Creek allottee, which was held to be upon delivery and acceptance of the patent. This opinion is to be identified by File No. Ind. Ter.

Div. 2278-1902, and is a Departmental record and construction of the question, a copy of which we attach hereto as appendix. In the concluding paragraph of the opinion it is said:

“ *The acceptance of the deed by the allottee is to be taken as an assent on his part to the allotment and sale of the land of the tribe as in said agreement provided, and as a relinquishment of all his right, title and interest in and to the same, except in the proceeds of the land reserved from allotment. Not until such a deed is executed, approved and accepted is the transaction complete and the title vested in the allottee.*

“ I am of opinion that the phrase, ‘after receiving title,’ should be construed as referring to the time when *title actually passes by the delivery and acceptance of the deed provided for in said agreement.*”

The Secretary of the Interior, evidently recognizing the cogency of the reasoning in support of that proposition, decided the same question in the same manner in an opinion rendered on February 18, 1904, in Creek Allotment Contest No. 730, entitled *Major v. Thompson*. This opinion may be identified as I. T. D. 6752-1903, and is found on page 193 of the report of the Commission for the year ending June 30, 1904. This was a case that went to the Secretary of the Interior on appeal, and involved the

question, where an allotment had been made and the patent had not been delivered, whether title had passed and jurisdiction to re-allot the land had been lost. In this case the Secretary said:

“ The acceptance of the deed has the effect of the execution and delivery of a deed of release of the allottee's interest in the other communal lands allotted to others of the tribe, like the voluntary deed in partition of one of several common owners. This makes acceptance of the deed a part of the transaction of partition or allotment of the communal property in severalty to the individual members of the communal owners. Such deed is therefore not the equivalent of a patent by the United States to public lands. The individual entryman has no interest in the mass of public lands, and has nothing therein to release. At or before the time of the final entry he renders the full consideration for the land he seeks to acquire, and his assent to the passing of legal title to him is complete at the instant of the final entry. The patent when issued relates to that date, though issued long afterwards. The issue and record of the patent vest legal title, whether it is delivered or not. (*United States v. Schurz*, 102 U. S. 378.) But the nature of Indian titles and effect given by the statute to the delivery and acceptance of the tribal deed make the doctrine of that case clearly inapplicable to allotment deeds.”

At the time the allotment was made Barney Thlocco was dead and hence the allotment was void and vested no title in his heirs.

The allotment to Barney Thlocco was void and passed no title for the reason as is conceded and established by the record that whether or not he was dead on April 1, 1899, he was dead on June 30, 1902, the date of his allotment. Up to March 1, 1901, Congress did not recognize the right to the lands of the tribe of any dead Indian as having survived his death. In other words, when a citizen died his rights died with him. This was so held by this court in the case of *Sizemore v. Brady*, 235 U. S. 441, wherein it was said by the court:

“ The right of each individual to participate in the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise the right was at an end.”

The Original Creek Agreement, however, on May 25, 1901, for the first time undertook to recreate in the heirs of a dead citizen the rights which that citizen would have enjoyed if he had survived to claim them. This provision was made by section 28 of that act which reads as follows:

“ All citizens who were living on the first day of April, eighteen hundred and ninety-nine, en-

titled to be enrolled under section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An Act for the protection of the people of Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

“ All children born to citizens so entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said Commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.”

It will be observed that this section provides, not for an allotment to the dead Indian, but says that the land shall descend to his heirs, and be allotted and distributed to *them*. So, it must be clear in the beginning that the only authority for preserving lands in the right of any dead citizen directed specifi-

cally that allotments of such lands should be made to the heirs. This was so, not only because Congress understood its authority to direct how such rights might be created, but was in recognition of the well-known rule of law that a pretended conveyance of lands to a dead person would pass no title. This point has been passed upon by the courts in connection with allotments of Indian lands.

Even if Barney Thlocco had been living on April 1st, 1899, when he died prior to the date of the allotment to him all the rights which he had in the tribal property died with him, as this court has said; these rights were neither alienable nor descendible. In drafting the Creek Agreement it was undertaken to provide for heirs of Indians who were living on April 1, 1899, and had since died without having received an allotment of land. Section 28 created the right to an allotment of land in favor of such heirs, contingent upon the performance of certain acts. The agreement of itself did not create the right of the heirs but did authorize certain steps to be taken which altogether brought into being the rights of the heirs to an allotment. "It contemplated that various preliminary acts were to precede any investiture of individual rights. The lands and funds to which it related were tribal property and only as it was carried into effect were individual claims to be fastened upon them." *Sizemore v. Brady, supra.*

What were the various preliminary acts that preceded any investiture of individual rights? Enrollment of the citizen *entitled under the law* in whose right the allotment was to be made, was one of them. Allotment of the land to the one designated by statute was another. In the case of *Sizemore v. Brady*, the plaintiff in error attempted to establish the principle that section 28 of the Creek Agreement created the right in the heirs of a dead Indian which descended and attached to the heirs by virtue of the act alone. In other words, that the act was a grant *in praesenti* regardless of the allotment; but the Supreme Court held otherwise and said that the allotment is just as essential as any other of the steps "to precede any investiture of individual rights." We are admonished then by the Supreme Court that only by compliance with the terms of the act are rights created. And as the necessity for the allotment was in issue, and was held to be essential, we must examine further to see what Congress said would constitute an allotment which would create an "investiture of individual rights."

The act said that "if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, *shall descend to*

his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to *them accordingly.*" The allotment to the persons designated by the statute was essential. If the allotment was not made to the right persons, there was no allotment, because such allotment was not authorized. An allotment to Barney Thlocco did not satisfy the requirements of the statute, because there was no such person as Barney Thlocco after the enactment of the Creek Agreement, and a pretended allotment to Barney Thlocco was a nullity, being an allotment to a fictitious person—to no one; and was not authorized by Congress.

It has been determined by this court that even where an allotment had been selected under the Curtis Act and the allottee died before the Creek Agreement became effective, his rights died with him; that he left no estate in the lands so selected; and that it took the operation of section 6 of the Creek Agreement confirming allotments previously made to create an estate in his right for his heirs. It was so held in the case of *Woodward v. deGraffenried*, 238 U. S. 284.

To the same effect are:

Lynch v. Franklin, 233 U. S. 269;

Barnett v. Way, 29 Okla. 780;

La Roque v. United States, 239 U. S. 62.

In the case of *United States v. Hawkins*, 217 Fed. 11, recently decided by the Circuit Court of Appeals for the Eighth Circuit, it was held that a patent which issued to an Indian who is dead conveyed no title whatever. It appears in that case that the Indian in whose right the patent issued was not entitled to enrollment, but the conclusion of the court is predicated quite as much upon the fact that the Indian was dead. This was emphasized by the dissenting opinion of Mr. Justice Hook, who maintained that the mere fact that the grantee named in a deed was dead did not make the conveyance entirely void. This case was decided upon the authority of *Moffatt v. United States*, 112 U. S. 31, where it was said that "a patent to a fictitious person is, in legal effect, no more than a declaration that the Government thereby conveys the land to no one."

The discussion by the court of the fact that the Indian James Hawkins died before April 1, 1899, related only to the defense of innocent purchaser invoked by certain persons who claimed that they had a right to rely on the judgment of the Dawes Commission, finding that James Hawkins was entitled to enrollment.

This case was distinguished from *United States v. Jacobs*, 197 Fed. 707, where a compliance with section 28 of the Creek Agreement, by making an allot-

ment direct to the heirs in the manner provided by law, was held effective to pass the title of the Creek Nation to such heirs, though in both cases the Indians in whose right the allottees claimed were not entitled to enrollment. Allotment to the heirs in the *Jacobs* case was held to be such compliance with the authority given the Commission as protected innocent purchasers because, as the court said, the title to the land undoubtedly passed; whereas in the *Hawkins* case the failure to follow the statute, and an allotment made to a dead Indian, was so far outside the authority of the statute and any legal sanction under the well-known principles of law that no color of title even passed, and the court said, "the good faith of the purchaser cannot create a title where none exists."

In the one case the allotment was complete and in the other it was not. The fundamental distinction between these cases is the allotment in conformity with the statute to the heirs in the one case, which passed title, and the attempted allotment to an Indian not in being in the other, which passed nothing.

The Commission itself recognized this fact, as appears from that part of the report of the Commission for the year ending June 30, 1905, on page 31, where it is said:

“ In conveying lands to the individual members of the tribe it is the practice, in cases where the allottee is dead, to issue the conveyance to his heirs. It is, therefore, essential that the Commission continue to record the death of persons whose names appear upon the final rolls, in order that the information may be available for the use of the Creek Land Office in the preparation of patents.”

The case of the *United States v. Hawkins*, 217 Fed. 11, is absolutely convincing on this point, and to remove all doubt as to what the court meant it is only necessary to read the dissenting opinion of Justice Hook, as follows:

“ I doubt that a deed or patent to a dead man is so utterly void that his heirs can convey no valid interest to an innocent purchaser. The ancient ceremony of the transfer of land which required a living grantee does not prevail in this country, and the rule based upon it is giving way. So much for the case of the lessees.”

In *Baker v. Lane* (82 Kan. 715, 28 L. R. A. (N. S.) 405) the Supreme Court of Kansas said:

“ A deed to a person not living and his heirs is void, there being no person to take under it. (Citing) 1 Jones, Real Property in Conveyancing, section 223; Washburn, Real Property, 6th ed., section 2121; Devlin Deeds, 2d ed., section

123; *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543; *Miller v. Chittendm*, 2 Iowa 315; *Neal v. Nelson*, 117 N. C. 393, 53 Am. St. Rep. 590, 23 S. E. 428."

In the case of *Morgan v. Hazelhurst Lodge*, 53 Miss. 665, paragraph one of the syllabus reads:

"Where in the premises of a deed A is stated to be party of the first part, and M party of the second part, the *grant* and the *habendum* being to M and his heirs if M is not *in esse* at the time of the execution of the deed, it is void."

The court said in the opinion:

"In *Hunter v. Watson*, 12 Cal. 363-376, it was assumed by the court that the deed to Knox, having been made after his death, must be laid out of the question as a nullity. That made to Knox and his heirs, 'heirs' was not a word of purchase to carry the estate, but a limitation defining and qualifying the title. That principle is laid down without restriction in 2 Washburn on Real Property 239. In *Jackson v. Phipps*, 12 Johns. 418, the understanding was that Joseph should give to Aaron Phipps a mortgage. Joseph signed, sealed and acknowledged the instrument; but Aaron having died before there had been a delivery to and acceptance by him, or any person for him, it was held inoperative, although the son and heir accepted it afterwards. *Johnson v. Dunlap*, 1 Johns. Cas. 114, is in principle and

some of its features like this case. The deed was fully executed with a subscribing witness; but it was agreed that the grantor should retain the deed until the consideration money should be fully paid, 'and Wareham, the grantee, said he would not take it until the money was paid.' In this state of affairs the grantee died. The title failed to pass, because there had been no delivery. KENT, J., thought there was an equitable lien, but that it could not be set up at law as a legal estate.

" There must be a real grantee. A deed to a fictitious person is void. *Muskingum Turnpike v. Ward*, 13 Ohio 120. A deed to A or B is void by uncertainty; the grantor not having expressed his intent, it is impossible to determine which shall take. Bacon Abr. 'Grant' C but a deed to A or his heirs is good; for the intent is plain that the title shall vest in A if living, and if not, then in his heirs or devisees. *Ready v. Kearsley*, 14 Mich. 215, 225."

In *Neal v. Nelson*, 117 N. C. 393, 23 S. E. 428, the court said:

" Viewing the sheriff's deed as an attempted conveyance executed to W. A. Lash, Sr., after his death, it would be obviously void for want of a grantee, and for failure to deliver. * * * A deed to a person not then living 'and his heirs' is void because the word 'heirs' is a word of limitation, and not of purchase. *Hunter v. Watson*, 12 Cal. 363."

Upon an examination of the statutes relating to the allotment of the Creek lands it is clear that Congress provided definitely for two kinds of allotments—one to the living citizens and the other to the heirs of deceased citizens. And only in the event that allotment was made in the manner prescribed by law could title pass. Having provided for allotment of land to the heirs of deceased members of the tribe—that was the only manner in which the heirs could acquire the title where the deceased member had died before allotment. The contrary view does not follow by anything said by this court in the case of *Skelton v. Dill*, 235 U. S. 206, where it was stated:

“ Two or three years after the child's death his name was regularly placed upon the roll of Creek citizens by the Commission to the Five Civilized Tribes, and the lands in question were duly embraced in an allotment made on his behalf. A deed for them was also issued in his name, and this, by operation of law, vested the title in his heirs.”

But this was not a decision that allotment to a dead Indian passed title to his heirs. The point was not at issue in the case. The title created in this case was ~~not~~ the title upon which both parties relied. The court was merely reciting the steps taken in making the title claim by ^{ed} ~~other~~ parties leading up to the controverted questions of law to be decided. No

one familiar with the law will claim that the court has thereby decided this question, or that the court is in any way bound by this statement when a controverted question on that point is presented. In this case, moreover, the land was selected September 12, 1905, by the heirs of Archie Hamby, and patent issued in the name of Archie Hamby on May 24, 1907, under authority of section 5 of the Act of April 26, 1906, to make the patents after that date in the names of such deceased members.

The court merely found that section 5 of the Act of April 26, 1906, authorized the issuance of patent in the name of deceased allottees in lieu of the former necessary method of having patents run to the heirs.

Congress knew that under prior legislation there was no authority for allotting to dead Indians and recognizing that situation provided in the Act of April 26, 1906, "that all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective the title to the lands described therein shall inure to and vest in his heirs." This is legislative construction of the prior statutes that support our view of the matter.

The legislation providing for the allotment of lands is too well known to the court to make it necessary to set it out here. It is sufficient to refer to the fact that by section 3 of the Original Creek Agreement, it is provided that "all lands of said tribe except as herein provided shall be allotted among the citizens of the tribe by the said Commission so as to give each an equal share of the whole in value as nearly as may be." Who were citizens of the tribe and entitled to be enrolled and allotted was to be answered by the provisions for enrollment of the members of the tribe. Only citizens who were living on April 1, 1899, and otherwise qualified were entitled to be placed upon the Creek roll and any person who was not living on April 1st, 1899, was not entitled to be enrolled on the Creek roll; and no law of estoppel prior to March 4, 1907, withholding the hand of the Secretary from correcting the enrollment of one so improperly placed upon the roll, for the purpose of validating such illegal enrollment, is warranted by the letter or the spirit of the legislation upon this subject.

It was the duty of the Secretary to correct errors in enrollment and he was vested with authority until March 4, 1907.

It has been held by this court that until authority was expressly taken from the Interior Depart-

ment the power remained to correct errors and the court has refused to enjoin the Secretary from making corrections where such error had been committed. In the case of *United States ex rel Lowe v. Fisher*, 223 U. S. 95, 56 L. ed. 364, this court said:

“ Two propositions are however urged by relators; * * * 2 that the Secretary having on November 16, 1904, approved a list of Cherokee freedmen, containing the names of relators, on the ground that their ancestors had complied with the provisions for return to the nation, had no power to cancel their names. * * *

“ The relators, however, say that ‘the Dawes Commission, as is matter of official history, did not adopt the tribal rolls as confirmed, but proceeded to try the rights of persons to be on the tribal rolls, and the controversy ensued continued and the rolls were not closed until March 4, 1907, Congress refusing to heed administrative appeals for more time’ * * * .

“ It is manifest from this act that the contention of relators that the tribal rolls were to be treated or accepted as absolutely confirmed is unsound. * * *

“ Relators nevertheless insist that notwithstanding they were not entitled to be placed upon the rolls, yet, having been placed there, they cannot be taken off by the Secretary of the Interior * * * .

“ A roll made complete, it is argued, by legislation, excludes the idea of correction by an

executive officer; and, besides, it is urged that the certificates of allotment carry with them the sanction of the law's declaration that they shall be 'conclusive evidence' of the rights of the allottee. Physical possession of the lands described in them is to be given, it is pointed out, and, describing the conditions which were created and which would be disturbed by an exercise of power to recall them it is said that 'from the date of selection of their allotments under the law allottees did lease their allotments for grazing, oil and gas, mineral, and other purposes.' And, further, that 'allottees also, from the same date, created town sites where practicable, and sold town lots, with their title resting in their allotment selections or certificates,' and that such transactions have been declared valid by the Supreme Court of Oklahoma, citing *McWilliams Invest. Co. v. Livingston*, 22 Okla. 884, 98 Pac. 914; *Godfrey v. Iowa Land & T. Co.*, 21 Okla. 293, 95 Pac. 792.

" We recognize the strength of the considerations urged, but it certainly did not militate against the congressional policy of the allotment of lands to retain in the Secretary of the Interior the power of revision and correction until the final moment when jurisdiction was expressly taken from him as provided in § 2 of the Act of April 26, 1906 (34 Stat. at L. 137, chap. 1876), that is, the 4th day of March, 1907. That Congress could give such power to the Secretary of the Interior is settled. *Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722, and *Wallace v. Adams*, 204 U. S. 415,

51 L. ed. 547, 27 Sup. Ct. Rep. 363. *In all the legislation providing for the making of the rolls care is observed to prevent or correct mistakes and to defeat attempts at fraud.*”

In the case of *Cherokee Nation v. Whitmire*, 223 U. S. 108, in speaking of an investigation of a roll prepared by administrative officers, this court said:

“ It must be borne in mind that important rights were involved and no good reason could be urged against, or serious consequences apprehended from, another investigation. Those who were entitled to be enrolled could again establish their right. Those who were not so entitled, and who had got on the rolls either by mistake or fraud, had no legal ground of complaint. However, we are not required to consider the reasons which induced Congress to direct that a roll be made by the Dawes Commission. Congress had the power and as we have decided, exercised it.”

The same logic applies here. If Barney Thlocco was entitled to be enrolled, his heirs cannot be hurt by an inquiry into that fact; if he was not entitled to be enrolled, they have no cause of complaint and the establishment of that fact is essential to the rights of the other members of the tribe.

Section 5 of the Act of April 26, 1906, was not intended to repeal prior legislation or to introduce

any new theory or plan in the method of allotment or of passing title out of the Creek Nation into the members of the tribe. Prior to that date, under the law in force, it had been provided that patents should be delivered to allottees by the chief of the tribes. This provision changed the method of delivery of patents and reposed that duty with the Secretary of the Interior, but, at the same time, and by reason thereof, vested him with the responsibility and duty of ascertaining who were entitled to receive the patents, for without this investigation and knowledge he could not perform the duty with which he was charged—to deliver patents to those who were entitled to receive them.

Nor was it the intention of Congress by this section to convey title to any one who was not entitled under all former laws to receive it. The section provided for the recording of patents *legally* executed to *legal* allottees, and was not intended to make a title where none existed, nor to validate an allotment which was invalid because not made in compliance with the statute, nor was it intended in any particular to vary the requirements of the law then in force necessary to establish the allottable status of any members of the tribe. The intent was that *thereafter* the recording of patents should take the place of delivery; it was to make recording effective as to

allotments only with reference to allotments legally made, and was not intended to disturb the power of the Secretary to correct his mistakes or to correct the record of any allotment illegally made.

The resolution adopted by the Commission to the Five Civilized Tribes on May 24th, 1902, under which the arbitrary selection of allotment was made for Barney Thlocco on June 30, 1902, is without authority of law and the acts thereunder are void.

The allotment certificate issued to Barney Thlocco on June 30th, 1902, does not pretend to be issued on any selection made by him, or by any authority conferred by Congress upon the Commission. It reads in part as follows:

“ Allotments of land and homestead designations, as hereinafter described, are hereby made to the following named persons; in accordance with the resolution of the Commission adopted May 24, 1902, *viz.*: Roll No. 8592; No. Certificate 16986; Barney Thlocco—Sub-division of NW4, Sec. 9, Twp. 18, Range 7, Area 160 Acres.”

The resolution of May 24, 1902, referred to and under which this allotment is made reads as follows:

“ MUSKOGEE, INDIAN TERRITORY,

“ May 24, 1902.

“ A session of the Commission to the Five Civilized Tribes was held at its general office at

Muskogee, Indian Territory, on the above date, there being present Commissioners Bixby, Needles, and Breckenridge.

* * * * *

“ WHEREAS, section three of the Act of Congress approved March 1, 1901 (31 Stat. 861), known as the Creek Agreement, provides that:

“ ‘All lands of said tribe except as herein provided shall be allotted among the citizens of the tribe by said Commission so as to give to each citizen an equal share of the whole in value as nearly as may be,’

“And that

“ ‘ * * * there shall be allotted to each citizen one hundred and sixty acres of land,’

“and whereas, section seven of said act provides that

“ ‘ * * * each citizen shall select from his allotment forty acres of land as a homestead,’

“and that

“ ‘ * * * if for any reason such selection shall not be made for any citizen, it shall be the duty of said Commission to make selection for him.’

“ And, WHEREAS, numerous citizens of said nation have made no selection of land for allotment and others have made selection of only a portion of the land to which they are entitled, and

“ WHEREAS, after due notice given, many citizens of said nation have failed to make a *selection of a homestead*, therefore, be it

“ *Resolved*, That the acting chairman is hereby authorized and empowered by and on behalf of the Commission to allot to each citizen out of the lands of the Creek Nation not heretofore allotted or selected such an amount of land of at least average quality as will make the total allotment of each citizen one hundred and sixty acres, and to select a homestead for such citizens in all cases where a selection of a homestead has not been made by or on behalf of said citizen:

“ *Provided*, That the allotment and selection of homestead so made for a citizen shall include improvements shown by the plats or records of the office to belong to said citizen.

“ On motion of Commissioner Breckenridge, duly seconded, the same was unanimously adopted.

* * * * *

“ There being no further business before the meeting the Commission on motion was adjourned.

Attest:

A. L. AYLESWORTH,

Secretary.”

* * * * *

TAMS BIXBY,

Acting Chairman.

The authority of the Commission to allot lands to the members of the tribe is contained in section 3 of the Act of Congress of March 1, 1901, reading as follows:

“ All lands of said tribe, except as herein provided shall be allotted among the *citizens of the tribe* by said Commission so as to give each an equal share of the whole in value, as nearly as may be, IN MANNER FOLLOWING: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values; and any allottee receiving lands of less than such standard value may, at any time, select other lands, which, at their appraised value, are sufficient to make his allotment equal in value to the standard so fixed.

“ If any citizen select lands the appraised value of which, for any reason, is in excess of such standard value, the excess of value shall be charged against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further distribution of property or funds of the tribe until all other citizens have received lands and money equal in value to his allotment. If any citizen select lands the appraised value of which

is in excess of such standard value, he may pay the overplus in money, but if he fail to do so, the same shall be charged against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further distribution of property or funds until all other citizens shall have received lands and funds equal in value to his allotment; and if there be not sufficient funds of the tribe to make the allotments of all other citizens of the tribe equal in value to his, then the surplus shall be a lien upon the rents and profits of his allotment until paid."

The resolution of the Commission to arbitrarily allot lands recites that whereas said section provides that "all lands of said tribe except as herein provided shall be allotted among the citizens of the tribe by said Commission so as to give to each citizen an equal share of the whole in value, as nearly as may be, and that there shall be allotted to each citizen 160 acres of land." The resolution then proceeds to quote from section 7 of the act that, whereas said section provides that "each citizen shall select from his allotment 40 acres of land as his homestead, and that if for any reason such selection shall not be made for any citizen, it shall be the duty of said Commission to make such selection for him."

Upon reading sections 3 and 7 referred to it will be seen that the Commission did not confine itself to

the authority granted by these provisions. In their recital as to the authority contained in section 3 they omitted the direction that the allotment shall be made "in manner following: There shall be allotted to each citizen 160 acres of land * * * the boundaries to conform to the Government survey * * * which may be selected by him so as to include the improvements which belong to him." This was an express direction that the allotment was to be made upon the selection of the citizen. This idea is carried throughout the legislation referring to allotments, and in numerous places reference is made to the selection so to be made by the citizen. It appears throughout the Original Creek Agreement that selection by the Indian was a necessary step in the allotment of land. Section 3 of the original treaty provides that the allottee may *select* his allotment so as to include his improvements. Section 4 of the same treaty provides that the allotment for minors may be *selected* by the father, mother, or guardian, and grants to the Commission the right to *select* for prisoners, convicts, and aged and infirm persons. Section 5 provides that from other lands in his possession the allottee may *select* allotments for himself and his family. Section 7 requires that each Indian shall *select* from his allotment 40 acres as a homestead. Section 23 provides that a patent shall be executed and delivered to the citizen who has *selected* or may here-

after *select* his allotment, which is not contested. Section 37 provides that a Creek citizen may rent his allotment when *selected* for a term not exceeding one year. Section 38 provides that after any citizen has *selected* his allotment he may dispose of any timber thereon. In the supplemental treaty provision is made for curing erroneous selections made by citizens, and section 19 of the same treaty provides that after the citizen has made his *selection* the Secretary shall place him in possession of his allotment. Section 7 of the Act of May, 27, 1908, provides that as soon as practicable after the sixty days' contest period expires, after *selection*, the Secretary shall cause a patent to issue.

The Original Creek Agreement outlined a plan comprehensive in its terms for the allotment of lands among those found to be entitled to enrollment. The enrollment was predicated upon section twenty-one of the Curtis Act with the proviso that only those who were alive on April 1, 1899, should be enrolled. The acreage each individual Indian should receive for his own allotment was fixed. The execution of deeds by the Principal Chief and the Secretary of the Interior was provided for in section twenty-three. The acceptance of the deeds by the allottee by which he would relinquish whatever right and title he had in the other tribal lands being allotted in severalty un-

der the terms of the act, was provided for. In other words, the scheme of allotment was sufficient, if followed by the administrative officers, to give each enrolled Indian, entitled to receive an allotment, his proper share of the tribal lands, and in the manner of the allotment and acceptance of the deeds by him, gain his consent to the allotment in severalty of all the lands of the tribe.

Despite this comprehensive scheme, the result of much labor and effort on the part of Congress, directing how the work must be done, on May 24, 1902, the Commission to the Five Civilized Tribes adopted the foregoing resolution, thereby AMENDING the Act of Congress, giving the Commission the right to select homesteads for those, who having made selection of an allotment, neglected to apply for a particular tract to be set aside for a homestead. This amendment by the Commission of the Act of Congress gave to the Commission the additional right to select an entire allotment for those who on May 24th, 1902, had failed to appear and make a selection of lands for themselves, provided, of course, that Congress conferred upon the Commission to the Five Civilized Tribes the power to legislate. It is provided in the Act of Congress that living citizens may select their own allotments; that the selections for minors shall be made by guardians; that selection

for incompetents, prisoners, convicts, aged and infirm persons, shall be by guardians, curators, or suitable person akin to them. This direction to the Commission is plain in its provisions and the language used is broad enough to eliminate discretion and certainly it does not confer upon the Commission the power to legislate and amend the Acts of Congress with regard to the tribal property.

In the case of *Daniels v. Wagner*, 237 U. S. 547, 56 L. ed. 1102, this court in discussing the exercise of arbitrary and unwarranted discretion by the officers of the Land Office, says:

“ That although Congress may have the power to provide for the disposition of the public domain and fix the terms and conditions upon which the people may enjoy the right to purchase, it has not done so, *since every command which it has expressed on this subject has been disregarded, and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in the administrative officers appointed for the purpose of giving effect to the law. When the true character of the proposition thus becomes fixed it becomes unnecessary to go further to demonstrate its want of foundation. And the inherent vice which thus clearly appears from the mere statement of the proposition when reduced to the ultimate conceptions which it involves is not relieved by the suggestion that the*

action taken in this case by the Department rested not upon the assumption that such discretion arose because of the primary mistake made by the local land officers concerning the location entry and the allowance of the filing of claims which were subsequent in date. We say this because thus seemingly to limit the discretionary power exerted, would in our opinion, aggravate its manifest unsoundness, for the power as thus qualified would come to this: That the commission of a wrong by the officers of the Department in disobeying the Act of Congress and in denying to an individual a right expressly conferred upon him by law would become the generating source of a discretionary power to make the disobedience of the law lawful and the taking away of the right of an individual legal."

In discussing section 7 of the Act of March 1, 1901, the Commission assumed the words "if for any reason such selection be not made for any citizen it shall be the duty of said Commission to make such selection for him" to be authority to make the selection. Just what was referred to by this language is to be determined upon by reading the remainder of the sentence which precedes that, as follows:

" Each citizen shall select from his allotment forty acres of land as a homestead, which shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, condi-

tioned as above: *Provided*, That selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who cannot select for themselves, may be made in the manner herein provided for the selection of their allotments; and if, for any reason such selection be not made for any citizen it shall be the duty of said Commission to make selection for him."

It is plain to be seen that the direction to the Commission contained here is that as to those who could not make selection of their homesteads out of their allotments for themselves, because of personal disability, such as those enumerated there—"minors, prisoners, convicts, incompetent, aged and infirm persons"—selection should be made in the manner herein provided for the selection of their allotments. This, then, refers us to section 4, which provides that "an allotment for a minor may be selected by his father, mother, or guardian, and allotments for prisoners, convicts, aged and infirm persons by their duly appointed agents, and allotments for incompetents by guardians, curators or suitable person akin to them." Though it was made the duty of the Commission to see that selections made by such personal representatives were made for the best interests of such persons, it did not vest the Commission with authority to make the selections.

Then, in section 7, in directing that if for any reason such selection be not made for any citizen, that is to say, if the homestead be not selected for "minors, prisoners, convicts, incompetents, aged and infirm persons who cannot select for themselves," it then devolved upon the Commission to make such selection, that is, to select the homestead for persons of this class who were under a disability. This is the full extent of the authority granted the Commission to make selections, and we have no hesitation in saying that Congress never intended to vest authority in the Commission to make any selection for any member of the tribe except homesteads for the classes we have mentioned, and the Commission to the Five Civilized Tribes exceeded its authority in making the selection arbitrarily to Barney Thlocco. That neither Congress nor the Secretary of the Interior intended to confer such jurisdiction upon the Commission appears from the rules promulgated October 7, 1898, by the Secretary of the Interior for the guidance of the Commission, when the land office was opened under the provisions of the Curtis Act (Act of June 28, 1898). After quoting so much of the act as applies to allotments the Secretary in these rules, first printed in the sixth annual report of the Commission to the Five Civilized Tribes for the year 1899, and found on pages 81, 82 and 83 thereof, says:

“ In order, therefore to give effect to the provisions of said act according to its design, and to enable every member of each tribe to select and to have set apart to him lands to be allotted to him in amount approximating his share as aforesaid, the Commission to the Five Civilized Tribes is instructed, as a means preparatory to and in aid of the duty of allotment of the lands of said tribes required of it by said act, to proceed as early as practicable to establish an office within the territory of each tribe, provided with proper and suitable records, including a copy of the United States survey of the lands of the tribe, for the purpose of registering each and every selection of lands made by any member of the tribe for his allotment; and in order to make such selection of lands by any member of any tribe effective and valid such member, or the head of each family, shall be required to appear in person at the office within his tribe and to make application to one of the members of said Commission or to some one by said Commission authorized to act for it in performing such duty, to have set apart to him the lands selected by him for himself and his wife and minor children; and such application shall be prepared by some member of said Commission, or the person so authorized, and the applicant shall be required to therein make oath that he has, in person actually been upon the lands so selected by him, and is fully informed as to the location of the same and the character of the soil; that the land is suitable for a home for himself and family; that he has in good faith selected such lands, and will accept same in allotment to himself and

family; that no part of same is lawfully held by any other member of the tribe; and thereafter he may occupy, control and rent the same for any period not exceeding one year by any one contract until lands are in fact allotted to him under the terms of said act, and will be protected therein by the Government from interference by all other persons whomsoever. Selections may be made for orphans, incompetents, and prisoners by guardians and relatives.

“ Any selection of lands otherwise made by any member of any tribe, and any rent contract made for any longer period than one year, or for other than the current year, shall be void.”

These rules promulgated by the Secretary of the Interior for the guidance of the Commission have never been repealed or recalled. An amendment was added by the Secretary on April 7, 1899, which did not materially change or modify the right of selection. The rule above quoted was made while the Curtis Act was in effect, and it is well to note that no mention is made therein of a right of selection in the members of the tribes. The Original Creek Agreement, which was in force when the resolution of the Commission to arbitrarily allot the members of the Creek Nation was adopted, did give the right of selection, and with a clearness and directness not to be mistaken makes provision for all classes of citizens and designates persons who shall make selec-

tions for those who by reason of any disability might be unable to make selection in person.

This departmental construction of the “right to make selection” and the rule above quoted is binding upon the Department and upon the Commission, and in the well-considered opinion of Justice PITNEY, of the Supreme Court, in the case of *Woodward v. de Graffenreid*, 238 U. S. 234, decided June 14, 1915, these rules are set out in a foot-note to the opinion and the “right to select” is emphasized by italics.

In a very able discussion of the powers conferred upon the Commission to the Five Civilized Tribes by the Acts of Congress, Judge SANBORN, of the United States Circuit Court of Appeals for the Eighth Circuit in the case of *Malone v. Alderdice*, 212 Fed. l. c. 671, says :

“ It is also true in making the allotments it was essential to the discharge of its duty that the Commission should decide at the time each citizen or freedman made his selection of his allotment, and also at the time he made his selection of his homestead, whether or not he was a minor in order to determine whether his selection must be made by himself or by another. But it was also indispensable for it to determine at such times in each case and for the same reason whether or not the applicant was a prisoner, a convict, an incompetent or an aged or infirm person.”

The court here recognizes the right of the citizen to make a selection of an allotment of lands as provided by the Act of Congress. If Congress had intended that the right to make selections for citizens should be conferred upon the Commission, then it would never have been so specific in its directions as to how selections should be made by minors, prisoners, convicts, incompetents, and aged or infirm persons.

Section 23 of the Act of March 1, 1901, provided that "any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title and interest in and to the same, except in the proceeds of lands reserved from allotment." The allotment of lands involved some of the features of a contract. The lands of the Creek Nation were tribal lands and title vested in the individual members of the tribe only when the steps were taken provided for by law. And it is clear that an arbitrary allotment to a member of the tribe did not meet the requirements of the law, which require that each citizen might select his allotment and receive the patent therefor. This theory was recognized by the Supreme Court of the United States in the case of *Choate v. Trapp*, 224 U. S. 665, 56 L. ed. 941, which we refer to more fully herein.

In the case of *Morris v. United States*, 174 U. S. 196-359, 43 L. ed. 946, this court in discussing the action of the Land Office said:

“ Besides the facts of the case show that Congress is asserting title and dominion over these lands for public purposes. Whether Congress should exercise its power over these reserved lands by dredging and thus restoring navigation and fishery, or by reclaiming them from the waters for wharfing purposes, or to convert them into public parks could only be determined by Congress, and not by the functionaries of the land office.”

The case at bar is in many respects similar to those arising from the decisions of the Land Office. The distinction is found in the provisions of the Act of March 1, 1901, providing for the acceptance to operate as a relinquishment of the interest of the allottee in other tribal lands, and as necessary to pass the legal title to and vest it in him. It is too well settled in the public land cases to need the citation of authority, that where the officer acts without authority the grant is void. We insist that the Commission to the Five Civilized Tribes was never vested with authority to make an arbitrary allotment to any dead Indian. The acts of the Commission in so doing were void.

And it is obvious that if the Commission had observed the direction of Congress and made allotments only to those who selected them, the contention in this case would never have arisen, for there would have been no allotment to Barney Thlocco. It was in the class of arbitrary allotments that these mistakes were possible, and not only possible, but very likely to, and did, frequently occur. But if, perchance, the enrollment or allotment had been made to the heirs of Barney Thlocco upon the false representation of any one interested that Barney Thlocco was living on April 1, 1899, the Government, upon discovery of the fact that he was not then living, could have effectively based its suit upon the fraud thus committed, which it was unable in this case to charge.

In the case at bar the disposition of certain lands, held in trust for the Indians was undertaken by Congress. The legislation on the subject directs that certain things be done. In the case of *Sizemore v. Brady*, *supra*, it is said that: "The lands and funds to which it related were tribal property, and only as it was carried into effect were individual claims to be fastened upon them." If the Commission in the exercise of an unlimited and undefined discretion attempted to fasten individual claims upon any portion of the tribal property, such action has no

force or effect in divesting the title of the tribe from such land.

Section five of the Act of April 26, 1906 (34 Stat. at L. 137), cannot operate upon a void act of the Department and create a title where none existed prior to the passage of the act. This section was passed long after the deeds to Barney Thlocco sought to be canceled by the Government were recorded. At the time of their record it was provided that title did not pass until the patents were accepted by the allottee. The patents to Thlocco remain in the office of the Commission to the Five Civilized Tribes. The attempt to deliver them failed for the good and sufficient reason that he was dead. His heirs did not apply for them for the reason, that knowing he died before April 1st, 1899, they would not be entitled to an allotment in his right, and they now seek to claim the benefit of allotment without furnishing the proof that he was living on April 1st, 1899. Before this act became effective the record discloses that the Commission to the Five Tribes had started an investigation as to whether or not Thlocco was living on April 1st, 1899, and entitled to enrollment and allotment. Their conclusion based upon sufficient evidence to support it was submitted to the Secretary and that official on December 13, 1906, ordered the name stricken from the roll. If the contention of the

heirs of Thlocco be sound, then, even though the Secretary had found that Thlocco died prior to April 1st, 1899, and was therefore not entitled to enrollment, under the terms of section five it became and was his duty to see that the patents to this person not entitled to receive the same were delivered to his heirs for section five of the Act of April 26, 1906, says: "and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same." It has been repeatedly held that the tribe was the ward of the government and that in allotting their land in severalty the United States was charged with the duty of distributing a trust estate to those entitled to receive the same and here we would have the Government, acting as trustee and perfecting the title in those who they have found were not entitled to any benefit of the acts authorizing allotment. On August 25th, 1904, more than two years before the title passed to Barney Thlocco under the contention of the appellees, the Commission to the Five Tribes notified the Secretary that they had information that Thlocco died prior to April 1, 1899. They were authorized to make further investigation and report the result. This was done and testimony was taken on October 21, 1905, and November 14, 1905, showing that he died in January, 1899. The heirs of Barney Thlocco never appeared to claim or

assert any interest in this allotment until 1913. This was more than fourteen years after his death. There can be no innocent parties to suffer in this case for all conveyances made by the numerous, reputed heirs of Barney Thlocco were made when it was not only a matter of public record but of common knowledge that the Government and the Creek Nation were insistent in their claim that he died before April 1, 1899, and was therefore not entitled to allotment. If he was in fact alive after that date the heirs are not hurt. If he in fact died before April 1, 1899, then a wrong has been perpetrated upon every citizen of the Creek Nation unless this court grants relief and permits this fact to be established. The judgment of the Commission so strongly urged as conclusive, is lacking in so many of the elements necessary to constitute a final adjudication, in a matter where the rights of a dependent people that this great Government elects to treat as its wards are involved, that if any doubt exists it should be resolved in favor of the Creek Tribe of Indians and the evidence offered in support of the contentions made in the bill be admitted.

We respectfully submit that for the reasons we have discussed in addition to other arguments made in this case, the three questions certified by the Circuit Court of Appeals should be answered in the affirmative.

GRANT FOREMAN,

JAMES D. SIMMS,

As Amici Curiae.

APPENDIX.

Ind. Ter. Div.
2278 — 1902.

DEPARTMENT OF THE INTERIOR.

OFFICE OF THE ASSISTANT ATTORNEY GENERAL.

Washington, D. C.,

April 24, 1902.

The Secretary of the Interior,

SIR:

The Department has held that under the agreement with the Creek Indians ratified by the Act of March 1, 1901 (31 Stat. 861), Creek citizens may not rent the lands selected by them for allotment for a longer period than one year until deeds shall have been issued to them. It is now urged that this construction should not obtain but that said agreement should be construed as authorizing the leasing of such allotments without restriction as to the length of the term, as soon as the selection has been made and certificate issued thereon and the matter has been submitted for my opinion.

Paragraph 37 of said agreement contains a provision as follows:

Creek citizens may rent their allotments, when selected, for a term not exceeding one year, and after receiving title thereto without restriction. * * *

Under that agreement each citizen was to receive an allotment of one hundred sixty acres of land to be selected by or for him in the manner prescribed therein and the principal chief was to execute, in due form, and deliver to each citizen so selecting an allotment, "a deed conveying to him all right, title and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate." This deed is to be approved by the Secretary of the Interior, which approval is to serve as a relinquishment of all right, title and interest of the United States in the land described therein. The acceptance of the deed by the allottee is to be taken as an assent on his part to the allotment and sale of the lands of the tribe, as in said agreement provided, and as a relinquishment of all his right, title and interest in and to the same, except in the proceeds of the land reserved from allotment. Not until such a deed is executed, approved and accepted is the transaction completed and the title vested in the allottee. The completion of the transaction was evidently the point of time referred to in the expression "and after receiving title thereto without restriction."

Upon making selection the applicant is given a certificate stating that he has selected the land described, and this is the allotment certificate mentioned in the agreement. It is evidence that the person to whom it is given has selected an allotment. Thereafter and until title passes to him, he may, under the first clause of paragraph 37, rent his allotment for a term not exceeding one year. Theoretically, the certificate would issue immediately upon the selection being presented and the provision permitting the renting of allotments must be read with this theory in mind. There would be no room for the operation of the first clause if the contention were correct that it refers only to the time between the presentation of a selection and the issuance of an allotment certificate. It may be that in administering this law it has been found advisable to delay the issuance of a certificate until it can be ascertained whether such selection should be allowed but such delay would be too short to make a permission to rent during that time of any practical benefit to the allottee. That delay was not, however, contemplated by the agreement and therefor the fact that there is such a delay does not constitute a valid argument in support of the contention that the first clause of paragraph 37 relates to the period covered by it.

I am of opinion that the phrase "after receiving title," should be construed as referring to the time when title actually passes by the delivery and acceptance of the deed provided for in said agreement.

The paper submitted is herewith returned.

Very respectfully,

WILLIS VANDEVENTER,

April 24th, 1902,

Assistant Attorney General.

Approved:

E. A. HITCHCOCK,

Secretary.

1—480.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., April 12, 1917.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true and exact copy of the original as it appears of the record and files of this Department.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[Seal Department of the Interior.]

ALEXANDER T. VOGELSANG,
First Assistant Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, August 23, 1916.

D-40271.

In re HEIRS OF JEMIMA.

Application for Allotment in Creek Nation. Motion Denied.

Motion for Rehearing.

Motion for rehearing of departmental decision herein, of July 24, 1916, has been filed by Mr. R. C. Allen, National Attorney for the Creek Nation. The correctness of the conclusion reached by the Department is not questioned, but it is urged in support of the motion that the language used in

said decision might be construed as expressing the opinion of the Department on a state of facts different from that presented in said case.

The motion first challenges that part of the decision which deals with an allotment arbitrarily made by the Commission to the Five Civilized Tribes, and it is contended that before such an allotment can become effective as a segregation of the lands from the domain of the Creek Nation the allottee must accept the patents. It was found by the Department that the parties claiming to be the heirs of Jemima, and in whose behalf the application was originally filed, had fully accepted the allotment set apart in the name of Jemima and the question of the validity of an allotment, patents to which had not been accepted by the allottee or his heirs, was not before the Department and what was said by it was not applicable to such a state of facts.

Exception is also taken to the language of the decision dealing with the question of the validity of an allotment made in the name of a deceased person. What was said in this connection had reference to the validity of an allotment made to a duly enrolled citizen of the Creek Nation who was entitled to an allotment therein and whose heirs accepted the allotment. The holding of the Department in this connection has no reference to an allotment to a citizen who, for any reason, did not have an allottable status.

The question of the validity of an arbitrary allotment in the absence of the delivery of the patents conveying the land to the allottee was not before the Department, as it was found in the decision complained of that the patents in this case were properly delivered and duly accepted by the parties who claimed to be the heirs of the deceased. This question was therefore not decided. In this connection the Department said:

If acceptance is essential, ample proof thereof is found in the conduct of the present applicants in voluntarily intervening in an action now pending in

the district court of Creek County, Oklahoma, which involves the title to the land in question, and claiming title thereto by virtue of the issuance of the certificate and deeds above referred to.

This language must, of course, be construed in the light of the facts in this case, particularly the Department's finding that the patents had been duly delivered. The question of the acceptance of an allotment, where the patents had not been delivered, was not before the Department and the language quoted has no reference to such a case.

It is elementary that a decision must be construed as a whole and only with reference to the facts of the case decided therein. Connected expressions appearing therein must not be singled out as authority for deciding a case presenting an entirely different state of facts.

The motion for rehearing is denied.

BO SWEENEY,
Assistant Secretary.